82-1302

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SEA-LAND SERVICE, INC.,

Petitioner,

—against—

CARL O. AKERMANIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION OF SEA-LAND SERVICE, INC. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where respondent consented in district court to a Judgement on a Reduced Verdict in response to the trial court's offer of a "remittitur" which was beyond the power of that court to grant, did the Court of Appeals lack jurisdiction to entertain his cross-appeal?

2. When the district court granted a new trial on "the liability issues" in the event the "remittitur" was not accepted, was it a violation of the United States Const. amend. VII and the Judiciary Act of 1789 for the Court of Appeals, after having concluded that the "remittitur" accepted by respondent could not validly have been offered, to re-examine facts found by a jury by its own review of the evidence at trial for the stated purpose upon remand of "focus[ing] the district court's attention on matters that may obviate the need for a new trial. . ."?

3. Can the Court of Appeals remand a case to a district court for "further consideration consistent with . . . [its] . . . opinion" and ask for a re-exercise of discretion on an issue upon which the Court of Appeals *has held* the district court had already acted without abuse or mistake in law?

4. Where a district court orders a new trial in response to a motion pursuant to Rule 59 Fed.R.Civ.P. because of "clear and serious" error by the jury on a finding of fact, and is held by the Court of Appeals to in all respects have applied the law correctly and not to otherwise have abused its discretion, can the Court of Appeals properly issue an advisory opinion in order to "focus the district court's attention" on an alternative interpretation of how the jury might conceivably have interpreted the *facts,* in order to reach a result more pleasing to the Court of Appeals, without improperly impairing the subsequent exercise of discretion of the district court?

5. If the Court of Appeals was required to affirm the district court's grant of a new trial, because in all respects it correctly understood and applied the law and did not abuse its discretion, should the Court of Appeals have ordered a complete new trial on all issues of liability and damages ? In a seaman's comparative fault personal injury case brought pursuant to 46 U.S.C. § 688 *et seq.* (the Jones Act) are the liability issues ever "completely separable" from the issue of damages and were they in this case?

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OPINIONS BELOW

The decision of the Court of Appeals filed September 14, 1982 reversing the district court's judgment and remanding the case for further consideration consistent with the opinion, reported in 688 F.2d 898, is reprinted in Appendix "A."** The decision of the Court of Appeals dated October 28, 1982 denying petitioner's motion for rehearing and suggestion for rehearing *en banc* appears here in Appendix "B." The memorandum opinion of the United States District Court, Southern District of New York of October 14, 1981 deciding petitioner's motion pursuant to Rule 59 Fed.R. Civ.P. by granting a new trial on "liability issues" in the event respondent should not accept a "remittitur" is reported at 521 F. Supp. 44 and is reprinted in Appendix "C." The opinion of the district court denying petitioner's motion for reargument of that decision is reprinted in Appendix "D." The Judgment on a Reduced Verdict from which appeal was taken to the United States Court of Appeals, Second Circuit is reprinted in Appendix "E." The decision of the district court on remand, which is dated January 18, 1983, directing entry of judgment on the jury verdict despite respondent's agreement to accept the Judgment on a Reduced Verdict, is here reprinted in Appendix "F".

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* Parent companies:

R. J. Reynolds Industries, Inc.
Sea-Land Industries Investments, Inc.

Affiliates:

Sea-Land Industries, Inc.
Sea-Land Industries (Bermuda) Ltd.
Sea-Land Industries, U.S.A., Inc.
Sea Readiness, Inc.

** References to material included in the Appendices will be referred to as "App." followed by the appropriate letter.

JURISDICTION

Petitioner seeks review of a decision of the Court of Appeals for the Second Circuit filed September 14, 1982. By order dated October 28, 1982, the Court of Appeals denied petitioner's petition for rehearing and suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

U.S. CONST. amend. VII:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Judiciary Act of 1789, C.20, 1 Stat. at L.84:

> Sec. 22. *And be in further enacted*, That final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error,**** (a) And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court, *** be re-examined and reversed or affirmed in the Supreme Court, **** (b) But there shall be no reversal in either court on such writ of error for **** any error in fact. ****

46 U.S.C. § 688 (Jones Act); 45 U.S.C. § 51 *et seq.* (Federal Employers' Liability Act [FELA]).

STATEMENT OF THE CASE

Trial in the United States District Court, Southern District of New York of this Jones Act[1] seaman's personal injury action resulted in a jury verdict in respondent's favor on June 26, 1981 in the amount of $528,000 subject to reduction on account of the jury's finding (by special verdict) of respondent's 4% comparative fault.[2] Petitioner's motion for a new

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1 46 U.S.C. §§ 688 *et. seq.*

2 Certain elements of respondent's damages were discounted by the district court to present value reflecting inflation by agreement of the parties. The verdict thus reduced was $489,514.61. Respondent never reported his shipboard accident which he said occurred on June 4, 1977 and caused injury to his neck. At the time of this "injury," which was initially diagnosed as "sore neck muscles" and could not have involved more than a sprain, he was suffering, at age 59, from the effects of ancient cervical arthritis so severe that his treating doctor testified that had he examined respondent *before* his injury he would have "disqualified" him from work as a merchant seaman [App. G-6].

The jury damage verdict was in an amount within a few hundred dollars of what was asked for in summation [App. G-8] and was returned after the jury, despite an explicit charge on damages, inquired whether they were required to "install figures" for damages [App. G-9]. By special verdict the jury awarded $250,000 on account of pain and suffering for what could only have been an aggravation of a pre-existing condition, despite reference in respondent's medical records after the injury that "Tylenol keeps arthritic pain under control . . ." [App. G-11]. The award for future lost wages, from the date of the verdict to age 65 was $118,000. Between his retirement at maximum union pension shortly after the accident, until the time of trial, respondent was hospitalized on five occasions, for among other things, circulatory impairment caused by peripheral vascular disease (arteriosclerosis) resulting in crippling pain when respondent walked less than 100 yards [App. G-10].

The district court described the verdict as "undoubtedly generous" [521 F. Supp. 52, App. C-13]. But, in fact, it was in all respects aberrant and the result of respondent's attorney's misconduct in telling the jury, without basis, that petitioner's witnesses had lied when such argument was colorable only because of an otherwise irrelevant gap in the trial record. Failing to properly confront how the verdict was

trial pursuant to Rule 59 Fed.R.Civ.P. resulted in an opinion and order of the district court (the Hon. Charles S. Haight, Jr.) of October 14, 1981 (521 F. Supp. 44, S.D.N.Y. 1981) conditionally granting a new trial "on the issues of liability [*only*]" because, in the district court's view, the jury finding of but 4% contributory negligence was so low as to lead the trial judge to conclude that: "[i]n the circumstances of this case, I have no difficulty at all in concluding that the minimal percentage assigned to that fault constitutes clear and serious error" [521 F. Supp. at 50, App. C-9]. The granting of a partial new trial was conditioned upon respondent refusing to accept a "remittitur": not one involving reduction of the jury's damage award on account of excessiveness but achieving the same effect by *increasing* respondent's comparative fault from the jury's 4% to 25%, a figure which was arbitrarily adopted by the district court after its canvass of headnotes in West's Federal Practice Digest under the topic "assumption of risk, contributory negligence and division of damages" [521 F. Supp. at 50, App. C-9].

On October 26, 1981 petitioner moved to reargue the district court's decision on grounds that the court's "remittitur" was, in fact, an illegal additur. Since the district court had correctly applied the law with respect to when and in what circumstances a new trial be granted,[3] and assessed the facts with respect to the issue of respondent's comparative fault without abusing its discretion, petitioner argued that the proposed "remittitur" be

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obtained, the district court and later the Court of Appeals, impermissibly sought to avoid a retrial for reason, apparently, of "judicial economy."

3 The district court cited (at 521 F. Supp. 44, 48) *Bevevino* v. *M.S. Saydjari*, 574 F.2d 676, 677, 683-684 (2d Cir. 1978) for its specific approval of the rule set out in 6A *Moore's Federal Practice* § 59.08[5], at 59-160-59-161 (1973) which provides that the trial judge should "abstain from interfering with the verdict unless it is quite clear that the jury had reached a seriously erroneous result." [521 F. Supp. at 47-48, App. C-4]. The correctness of this rule was reaffirmed by the Court of Appeals' decision in this case [688 F.2d at 905, App. A-3].

recalled and an unconditional new trial granted. Upon reargument, petitioner also urged that the district court had mistakenly viewed the issues of comparative fault and damages as "completely separable"[4] in this or any other Jones Act case and that a new trial on all issues was required. Defendant's reargument motion was denied in all respects by the district court's order dated November 2, 1981 [App. D].

On November 9, 1981 respondent *accepted* the district court's "remittitur" in lieu of a new trial on liability issues [App. H] and consented to a Judgment on a Reduced Verdict [App. E]. Petitioner appealed and respondent, despite his consent to the judgment appealed from, cross-appealed. Upon appeal *both* petitioner and respondent argued that the district court was without power to order a "remittitur," the latter despite his consent. Petitioner additionally argued, as it had in district court, that the district court's re-examination of facts found by the jury respecting respondent's contributory negligence was in no way influenced by any mistaken view of the law, but that the "remittitur" was beyond the power of the district court to grant and, accordingly that a new trial on, at least, the liability issues was absolutely required. But again petitioner argued that because the issues of liability and damages were *not* completely separable a new trial on all issues was mandatory.

In his cross-appeal respondent, despite his consent to the Judgment on a Reduced Verdict (which established the Court of Appeals' jurisdiction), sought judgment based on the jury verdict and for that purpose joined petitioner's argument that the "remittitur," which he had accepted in order to avoid a retrial, was invalid. In support of his argument that the district court had mistakenly concluded that the jury's 4% finding was unconscionably low, respondent argued *not* that the trial judge had misunderstood the facts, but *only* that he had confused the

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4 The prerequisite for granting a partial new trial established in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931) which the district court decision cited [521 F. Supp. at 58, App. C-25].

proscribed defense in Jones Act cases of assumption of risk with contributory negligence. In reply, petitioner argued that the Court of Appeals was without power to consider respondent's cross-appeal because of plaintiff's consent to the judgment appealed from[5] and that, in any event, since the district court had made no mistake of law in deciding the contributory negligence issue, and had properly applied the correct test of when a new trial must be granted, the Court of Appeals was required to affirm the grant of a new trial but order it to be held on all, not just the liability issues.

On September 14, 1982 the Court of Appeals (688 F.2d 898) reversed the district court's judgment and remanded the case to district court for "further consideration consistent with [its] opinion." The Court of Appeals held that the "remittitur" was impermissible; but instead of ordering a new trial even on the liability issues as the decision of the district court had provided, it asked the trial court to *reconsider* its re-examination of the facts found by the jury. As the opinion makes clear, this request was the result of the Court of Appeals' own re-examination of the facts and its perception that inferences and conclusions different from those arrived at by the trial judge could possibly explain or "justify" the jury's 4% finding of comparative fault.

In sum, the Court of Appeals, without concluding: (1) that the district court had committed legal error by misapplying the law with respect to either comparative negligence or the granting of a new trial; or, (2) that the court's analysis of the facts was *so* mistaken as to constitute an abuse of discretion and, hence, require reversal on grounds of legal error, or (3) that the district court's opinion was too unclear for such assessment to be made, asked for a *second* consideration of the facts in order that the district court might successfully reconcile the jury's 4% finding with suggestions of novel and, indeed, not before

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5 On authority of *Donovan* v. *Penn Shipping Co., Inc.* 429 U.S. 648 (1977), *affirming per curiam, Donovan* v. *Penn Shipping Co., Inc.*, 536 F.2d 536 (2d Cir. 1976).

argued, "theories" of plaintiff's contributory negligence offered by the Court of Appeals' upon its "own review of the evidence . . ." [App. F-7].

On the basis of reference to Rule 50(c) Fed.R.Civ.P. providing for a conditional order of a new trial in the event of a grant by a district court of a motion for judgment n.o.v., the Court of Appeals concluded that it was "entirely appropriate to entertain the cross-appeal in this case" [688 F.2d at 904, App. A-9] as a result of which the appeals court was "afford[ed] . . . the opportunity to focus the district court's attention on matters that may obviate the need for a new trial or at least limit its scope" [*Id.*]. The Court of Appeals then "turned to" the cross-appeal for purposes of proposing a new *factual* theory of plaintiff's contributory negligence not mentioned in the summation of either party or argued to the district court on the post-trial motion. The purpose of this focusing of attention was clearly to encourage the district court to attempt to reconcile its view of the propriety of the jury's contributory negligence finding with the Court of Appeals' view of another "possible" basis of the jury's finding of contributory negligence—that respondent had been negligent "in the manner in which he performed his work" [688 F.2d at 905, App. A-10].

This *usual* demonstration of contributory negligence had not been argued in district court. Instead, the question of contributory negligence had focused upon the "continuing-to-work" theory in that plaintiff was not ordered or otherwise required to perform the work renewing pedestal supports on-deck at the time of his injury, which he had said had occurred in weather conditions which were only a "little bit too rough" [App. G-2]. This "theory," that respondent "could have, by an alternate course of conduct, avoided the danger" [521 F. Supp. at 49, App. C-6] was the *only* basis for evaluation of contributory negligence considered by the district court in the Rule 59 Fed.R.Civ.P. motion. Properly so.

In the determination of the post-trial motion Judge Haight, after first acknowledging the unquestionably sound principle

applicable to Jones Act cases—that mere continuing to work in the face of unsafe conditions is not basis, without more, for a finding of contributory negligence—concluded upon thorough review of the facts that there had been a requisite safe alternative admitted in plaintiff's testimony. At 521 F. Supp. 49 [App. C-7] the district court found as "essentially undisputed facts": (1) that the project of replacing the on-deck fittings had been going on for a period of a week, ten days, possibly longer; (2) that plaintiff had been preparing some of the replacement fittings while the vessel was in the Mediterranean and that the weather [there] was "real beautiful"; (3) that plaintiff, while given a number of projects, exercised a considerable degree of personal control as to which project he would work upon at what time and (4) that the accident occurred on a Saturday which was an overtime day on which plaintiff was not required to work at all, unless he wished to accrue overtime. On these bases, the district court found support for defendant's argument that "plaintiff could have performed this work while the vessel was still sailing in the beautiful weather of the relatively sheltered Mediterranean; *or, the vessel having progressed into the North Atlantic, he could have deferred the work until a different time if the weather conditions at a given moment created a hazardous condition.*" [521 F. Supp. at 49, App. C-7; emphasis added.]

On the basis of this analysis of the facts the trial judge concluded that he:

> . . . [did] not hold that a 4% allocation of contributory negligence can never be appropriate. But I do conclude that, in the circumstances of this case, it cannot be. As the defendant accurately states . . ., this is a case "in which plaintiff was working voluntarily on overtime and in which he admitted that he exercised discretion as to when and how he would perform this routine task." No compulsion to do this work at this time appears. Plaintiff could have reasonably foreseen that it would be safer to do burning and finishing on an exposed deck in the Mediterranean rather than the North Atlantic. [521 F. Supp. at 51; App. C-9, 10].

On January 18, 1983, in response to the obvious wish of the Court of Appeals, the district court reversed itself entirely and held that the jury assessment of the facts respecting contributory negligence had "not persuaded [him] that a four percent contributory negligence factor is against the weight of the evidence, thereby constituting serious error" [App. F-11], despite having initially concluding that he had had "no difficulty at all in concluding that the minimal percentage assigned to that fault constitutes clear and serious error" [App. C-9].

The district court was specifically directed by the Court of Appeals to first "*consider* whether the 'work performance' theory of contributory negligence finds enough support in the evidence . . . to *justify* the four percent factor" and instructed that "[i]f [the district court] concludes it does not, then [its] order for a new trial will stand," [688 F.2d at 905; App. A-11, emphasis added]. If the district court found the 4% factor to be justified on the basis of "work performance" negligence, it had then to consider whether the jury had erred in not attributing fault to plaintiff for negligently exercising his discretion. The trial court discharged its dual mandate and ordered entry of judgment on the jury verdict after concluding that a four percent assessment for "work performance," did not "bring[ ] about a 'seriously erroneous result.' " [App. F-8] and that respondent's "continuing-to-work," upon which the court's original holding was based, could be ignored.

But whether the district court fairly weighed the "work performance" evidence, assuming contrary to fact that any existed, is by no means clear. In discussing this "issue" the district court referred only to respondent's argument in summation [App. F-7, n. 1] that he had been doing the work in the only manner possible (i.e. which is properly an argument ***against***, not for, "work performance" negligence) because this supposedly demonstrated that plaintiff had had "little room for maneuver;" as well as to petitioner's summation argument (on the issue of proximate cause rather than contributory negligence, which the court acknowledged) that the injury had been ***wholly*** the result of a "momentary lapse of carelessness on [respondent's] part" [App. F-7, F-8, n. 2].

It would, therefore, seem that if the jury assessed four percent for "work performance" they did so in error and only because of this understandable failure (*assumed* by the district court [App. F-8, n. 2]) to grasp the significance of the contributory negligence/proximate cause distinction. To correct such error, whether due to disobedience of instructions or understandable error is the principal office of a Rule 59 Fed.R.Civ.P. motion. But the test of whether the motion should be granted is not whether the jury result can be *explained* but, as the Court of Appeals said, whether it can be "*justified.*" The motion is, of course, addressed to the trial court's conscience—to assess whether or not the verdict is clearly wrong, *not* to explain or reconcile how a jury mistake might have been made.

Whether, despite the district court's apparent correct perception of the true basis of the motion, the correct test was applied upon this "re-consideration" is, unfortunately, much to be doubted. For in conclusion, Judge Haight said: "[m]y own 'feel' for the case [to which the district court said it thought the Court of Appeals had extended only 'a certain deference' (App. F-9)] is that it was on this [continuing-to-work] theory of contributory negligence that the jury held plaintiff entitled to recover less than his full damages" [App. F-11]. Sound enough. Why else was the "work performance" theory not charged and not raised before oral argument when introduced by the Court of Appeals? The exhaustion of what remained of the district court's discretion could not have been more poignantly expressed. In short, the district court explained the verdict rather than justified it. How, after all, can a result based on a mistake be justified and why is not the trial court's "feel" rather than the appeals court's rationalization controlling?

Having decided that the jury's error—what the court assumed was its *misperception* of the contributory negligence issue—"justified" the verdict, the district court, as was necessary in order to achieve the result sought by the Court of Appeals, next proceeded to consider the *second* aspect of the

appeals court mandate: *reconsideration* of the proof respecting the "continuing-to-work" contributory negligence theory which had, of course, to be all but entirely discounted if on reconsideration a new trial motion was to be denied. Discounted it was, but in a way which the Court of Appeals had not apparently thought possible, despite its own review of the facts and assumed thorough familiarity with the district court's opinion which had not led it to suggest even the possibility of error on this basis.

The Court of Appeals, with ample reason, characterized the district court's assessment of the "continuing-to-work" theory of contributory negligence as " . . . based on a conclusion that Akermanis had authority to schedule his own work and that he exercised poor judgment by agreeing to work on the Los Angeles' deck on June 4, 1977, when he might have deferred the task to another day." [688 F.2d at 904, App. A-9]. The Court went on to state:

> "[i]f that was the jury's conclusion, then, based on the evidence presented at trial, Judge Haight was acting within his broad discretion in ruling that a finding of only 4% contributory negligence was against the weight of the evidence and that a new trial should be granted." [*Id.*]

In its most recent opinion, the district court characterized this aspect of respondent's contributory negligence as based on the claim that respondent "should have refused to perform the work in question in the conditions that prevailed on June 4" which the district court said was "a significantly different, and from defendant's point of view less appealing, proposition" from the question whether plaintiff should have performed this work before that time while the vessel was in the Mediterranean [App. F-10]; despite the fact that respondent was *not* ordered to work *on-deck* that morning. He was, rather, asked to continue work on the pedestal renewals by doing work *either* underdecks or on-deck. At the time of the request, the morning of June 4, 1977, respondent testified that " . . . new parts were to be made" [App. G-1]—work which would have been

done in the machine shop underdecks. Respondent was given "no list" [App. G-3] and the respect accorded one engineer by another was inconsistent with his being told when and how to do the routine work assigned [App. G-5]. Far from being less appealing, respondent's option to defer the work was the *substantial* contributory negligence argument offered the jury.[6]

Instead of extensively considering respondent's options on the day of the injury—which the Court of Appeals had already held to be sufficient basis for setting aside the jury's verdict—the district court primarily dealt with respondent's discretion *prior* thereto. The district court then proceeded to deal with this less important argument by extended reference to respondent's overtime sheets for the voyage [App. F-9, 10].[7] But respondent's options prior to the day of his accident was but one of four "continuing-to-work" considerations including the essentially undisputed one "that plaintiff, while given a number of projects . . ., exercised a considerable degree of personal control as to which project he would work upon at what time" [521 F. Supp. at 49, App. C-7] which had led the district

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6 In summation, petitioner framed the issue as follows:

> Did he have to do the burning that morning? Could he have waited until the afternoon? Could he have waited until the next day? The answer clearly is yes. [App. G-7].

7 These overtime sheets allegedly demonstrate that respondent spent some sixteen hours prior to June 4 working on this task. But this is in direct conflict with his trial testimony that it would not have taken more than 15 or 20 *minutes* to burn off the old angle irons [App. G-4; emphasis added]; and that the replacements " 'didn't take long to make it [sic]. You don't have to work for days. I could make four, five in *one day* or maybe six, maybe all eight.' " [521 F.Supp. at 50; App. C-8; emphasis added]. It is apparent that the district court's most recent opinion, reconsidering evidence heard some eighteen months previously, seized on but one item of evidence without benefit of other evidence which could put it into proper context. This *deus ex machina* approach is, we submit, inevitable if district courts are to be placed in the position of having to "reconsider" opinions granting new trials in the absence of error of law or abuse of discretion.

court to originally hold that "[n]o compulsion to do this work at this time appears" [521 F. Supp. at 51, App. C-10].

The district court in reconsidering the motion dealt with this true "continuing-to-work" argument for contributory negligence by concluding that "the chief engineer had made it plain that he wished the work completed before the vessel reached Rotterdam" [App. F-10][8] and that plaintiff had, on June 4, 1977, been told to "resume burning and welding *work on-deck*" and that the first assistant engineer had "reiterated [his] direction that the *work* be performed that morning" [App. F-11, emphasis supplied].

But respondent was not told to work *on-deck*; he was only asked to continue a work *assignment* having both on-deck and underdeck components [see pp. 11-12, *supra*]. Thus, although he may have been told (as *he* testified) to resume burning, welding *and fabricating* "work" that morning, that did not mean that he was required to commence working on-deck in the face of what he considered to be unsafe conditions. According to his own testimony, respondent had ample discretion as to " 'when and how he would perform this routine task' " [521 F.Supp. at 51; App. C-9, 10]; and he could, therefore, have deferred the on-deck work in favor of fabricat-

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8 There is no such testimony in the record. The court was apparently relying on the unfounded assertion of respondent's counsel in the parties' most recent submissions to the court that "the vessel arrived in Rotterdam on June 6, 1977 . . . where the *crane* was used to unload other cargo. Consequently an *inference* may be drawn that the work had to be completed since it could not be done in port and work was required on the crane before discharge on June 6, 1977." [Plaintiff's Trial (sic) Brief, Dec. 17, 1982 at p. 16, emphasis added.] This argument is baseless for the simple reason that respondent was not repairing the crane itself but an angle iron atop a pedestal which provided a resting place for the crane's securing turnbuckles which respondent's own expert described as not involving the "safety of the vessel". There was *no* testimony that any of these angle irons *had* to be renewed by any particular date, or that if there was no angle iron present the turnbuckle could not safely have been supported on the pedestal itself.

ing new parts in the underdecks machine shop until conditions, in his view, improved (as they did by no later than 12:00 noon that same day when the wind force was but 3-4 (Beaufort scale) about 1½ hours after the accident) [Deck Log, June 4, 1977].

The district court's analysis is, we respectfully submit, deficient on account of its failure to discriminate between the underdeck and on-deck work which respondent himself testified he was told the chief engineer wanted him to continue that morning. It focuses almost entirely on what was in the mind of the judge at the time he originally determined the new trial motion (the "Mediterranean" argument), but does not address the holding by the Court of Appeals that he would have been justified, based on the evidence, in ordering a new trial if he believed that the *jury* had concluded respondent should have deferred the work to later that day or the following day. Since Judge Haight states that it is his opinion that the jury *did* so conclude [App. F-11], was he not bound to adhere to his original ruling?

REASONS FOR GRANTING THE WRIT

A.

THE COURT OF APPEALS ERRED IN DETERMINING THAT IT HAD JURISDICTION TO ENTERTAIN RESPONDENT'S CROSS-APPEAL

Despite this Court's reaffirmance of ". . . the long-standing rule that a plaintiff in federal court, whether prosecuting a state or federal cause of action, may not appeal from a remittitur order he has accepted" (*Donovan* v. *Penn Shipping Co., Inc., et al.*, 429 U.S. 648 [1977], *affirming per curiam*, 536 F.2d 536 [2d Cir. 1976]), the Court of Appeals refused to apply the rule because of what it characterized as its rationale: "waiver and efficiency" [688 F.2d at 903, App. A-7]. Respondent's consent to the Judgment on a Reduced Verdict was disposed of as follows:

> Now that we have adjudicated Sea-Land's appeal and agreed with appellant that the District Judge lacked the power to condition the new trial order on a remittitur adjusting the contributory negligence percentage, the first step in ordering relief with respect to the appeal is, as Sea-Land requests, to vacate the judgment entered upon the reduced award on the ground that its entry was erroneous. Once we do that, it is conceptually difficult and practically unfair to think of the plaintiff as having waived a cross-appeal by consenting to a judgment that no longer exists. [688 F.2d at 903, App. A-7].

Apart from its dubious logic, this argument does not begin to address the substantive issue presented by the agreement of but one party to a particular disposition as that agreement affects the rights of the other party. The important point is not whether the judgment was of a kind which the district court was authorized to offer, but the fact of respondent's *consent* in order to avoid a retrial on "the liability issues" with attendant possibility of a defendant's verdict or assessment by a second jury of contributory negligence significantly greater than the 25% proposed by the district court. Nowhere, petitioner respectfully submits, does the Court of Appeals come to grips with that central issue.[9]

The authorities cited by the Court of Appeals in its opinion and by this Court in its *per curiam* opinion in *Donovan* v. *Penn Shipping Co., Inc., supra* make plain that the bar to

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9 As was noted by a majority in the Court of Appeals in *Donovan* v. *Penn Shipping Co.*, 536 F.2d at 538:

> The prejudice to the defendant in allowing the plaintiff to bypass the second trial and obtain direct review of the remittitur is therefore obvious. The defendant's right to have the second jury consider the issue of damages, although conditioned upon the plaintiff having first rejected the remittitur is nonetheless a valuable one. It should not be lightly disregarded. Furthermore, in those rare instances where a second trial is required, it provides yet an additional gauge by which the Court of Appeals can judge the propriety of the remittitur.

appeal by a party who has accepted a remittitur includes cross-appeals. *Mattox* v. *News Syndicate Co.*, 176 F.2d 897, 904 (2d Cir.), *cert. den.*, 338 U.S. 858 (1949); *Woodworth* v. *Chesbrough*, 244 U.S. 79 (1917) cited in *Donovan* v. *Penn Shipping Co.*, 429 U.S. at 649. See, also, *Westerman* v. *Sears, Roebuck & Co.*, 577 F.2d 873, 883 (5th Cir. 1978). However, under the rule fashioned by the Court of Appeals in this case, which in effect permits the courts to ignore a consent to a remittitur in circumstances where the underlying judgment "no longer exists," it can be anticipated that as a practical matter the *Donovan* rule will not apply to many cross-appeals. This "exception" would arise in any case where a defendant has successfully appealed for a new trial on a liability issue and plaintiff, who has accepted a remittitur of damages, cross-appeals—for in each of those cases, too, the reduced judgment which had been consented to would "no longer exist" in the event of a defendant's successful appeal and the Court of Appeals would be required to consider plaintiff's cross-appeal. It is not difficult to foresee that a defendant might forego a powerful argument that a mistake was made in the court's conduct of the trial—for example, in the charge on a liability issue—lest it face, should its argument *succeed*, restoration of the jury's damage assessment despite plaintiff's agreement that such award was too high.[10]

The appeals court's discussion of the "efficiency" rationale of *Donovan* v. *Penn Shipping Co.*, *supra* is, thus, badly flawed

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10 In this case petitioner claimed that respondent had sustained *no* damages, an argument which the district court expressly acknowledged. See, 521 F. Supp. at 47 [App. C-3]. Since some damage is an element of proof required to establish liability in any negligence case, the holding by the Court of Appeals in *this* case that the issues of liability and damages were "completely separable," although obviously wrong, would seemingly allow such holding in *any* case. It can therefore be anticipated that cross-appeals concerning accepted remittiturs will be brought *every time* defendant appeals on liability, against the possibility that the Court of Appeals will agree that remittitur should not have been granted and, as here, "holds" the jury verdict and orders retrial of liability only.

and not just to the extent already indicated. The discussion of "efficiency" was obviously intended to be restricted to this case, and was but the springboard for an advisory opinion designed to influence the district court. Thus the Court of Appeals determined that the efficiency argument was "less persuasive" in this case for the following reasons:

> . . .Normally, when an appellate court dismisses the appeal *or cross-appeal* of a plaintiff who has accepted a remittitur, the burden on the court system is reduced because there will be neither an appeal nor a new trial. That is not true in this case. If we dismiss the cross-appeal and simply return the case to the District Court for a new trial, now that the conditional aspect of the new trial order has ben excised, there would clearly be less of a burden on this Court. But that course would add considerably to the burden on the District Court, which would have to conduct a trial *that the cross-appellant is prepared now to show us should never have been ordered.* [688 F.2d at 903, App. A-7, 8; emphasis added.]

On the facts of this case, had respondent joined in petitioner's argument to the district court that it could not supplant a jury's finding of contributory negligence with one of its own, instead of accepting the benefit of a decision which he later argued was illegal, the trial judge, faced with the unusual circumstance of agreement to error by both parties, might well have himself "excised" his mistaken "remittitur."[11] And, of course, it is hardly enough to say that this case is "unusual" [688 F.2d at 904, App. A-9]; for that does not necessarily mean

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11 Of all the curious aspects of this curious case, the most curious is how respondent succeeded in exploiting the district court's error with the assistance of the Court of Appeals. Perhaps the time has passed for argument that the bar is, at least to some extent, obliged to relieve the bench of the embarrassment which follows an obvious error. Not every member of the federal bench is entirely familiar with the correct means by which the courts can redress a jury error. But respondent's counsel was.

that the Court of Appeals' holding will be as limited (i.e., to this case *only*) as that court perhaps believes.

The real premise of the court's argument concerning supposed efficiency—"cross-appellant is prepared now to show us [that a new trial] should never have been ordered" [App. A-9]—is false for the simplest reason: respondent failed to make the required showing. Indeed, the showing offered was not the demonstration which the Court of Appeals found persuasive. In truth, the Court of Appeals "turned to" and "entertained" the cross-appeal only in order to permit the Court of Appeals to show *the district court* why a new trial *need not* be ordered.

It is instructive to review the brief filed by respondent in the Court of Appeals, for it demonstrates that *all* respondent was prepared to show was that the district court had erred *as a matter of law* in characterizing respondent's failure to properly exercise his discretion as comparative fault (respondent arguing that this in fact constituted the proscribed defense of assumption of risk). But the Court of Appeals specifically held that the district court had not so erred [688 F.2d at 904, App. A-9].

Surely, as of the time of the filing of the Court of Appeals' opinion, it was apparent that respondent was *unprepared* to show that the new trial should not have been ordered, having demonstrated neither legal error nor abuse of discretion which are the sole proper predicates for a reversal by the Court of Appeals on the new trial issue. See, *Portman* v. *American Home Products Corp.*, 201 F.2d 847, 848 (2d Cir. 1953); *Compton* v. *Luckenbach Overseas Corporation*, 425 F.2d 1130 (2d Cir. 1970); *Fairmount Glassworks* v. *Cub Fork Coal Co.*, 287 U.S. 474, 481 (1933) and see, also, pp. 20 to 21, *infra*. In sum, the argument that the Court of Appeals could quickly and efficiently dispose of the new trial issue without retrial was not based on any showing which respondent could make, but upon the issuance of an advisory opinion by the Court of Appeals.

The opinion of the Court of Appeals is improper for two reasons: (1) it represents an unconstitutional re-examination of the facts by the appeals court when this right, by the Seventh Amendment of the United States Constitution, is reserved exclusively to the district courts; and, (2) once the Court of Appeals vacated the Judgment on a Reduced Verdict by holding the remittitur invalid, the court divested itself of jurisdiction to further consider an appeal from a non-final order (for a new trial). Surely, this Court has never before been confronted with a decision of a Court of Appeals where that court neither affirmed, reversed nor remanded for an essential clarification.[12] The Second Circuit "entertained" the cross-appeal but held only: "[i]n short, the District Judge, upon remand, has discretion whether or not to order a new trial" [688 F.2d at 905-06, App. A-11]. But this discretion had *already* been exercised without demonstrated abuse or other legal error. What ensued was a most unfortunate surrender by the district court of its constitutional prerogative. We respectfully submit that "judicial economy" cannot be purchased at such great cost.

B.

THE COURT OF APPEALS RE-EXAMINED FACTS FOUND BY THE JURY IN VIOLATION OF THE UNITED STATES CONSTITUTION AMEND. VII AND IMPERMISSIBLY INTERFERED WITH THE DISCRETION OF THE DISTRICT COURT.

Having determined that it should entertain the cross-appeal notwithstanding respondent's consent to the reduced judgment, and despite the resulting non-finality of the district court's order for a new trial, the Court of Appeals proceeded to ignore the proper scope of appellate review in considering an

12 Or even for further *proceedings* consistent with a holding by the appeals court affecting a decision already made. Here, the remand was for further "consideration" of an issue entirely *independent* of the validity of the remittitur (which was the only matter upon which the appeals court reversed).

order granting or denying a new trial. This Court has long held that neither it nor the circuit courts of appeals will ". . . review the action of a federal trial court in granting or denying a motion for a new trial for error of fact . . ." [*Fairmount Glassworks* v. *Cub Fork Coal Co.*, 287 U.S. at 481.] This rule was restated by Hand, J. in *Portman* v. *American Home Products Corp.*, 201 F.2d at 848 as follows:

> There may be errors that are not reviewable at all and among those that are not are erroneous orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence.

See, also, *Compton* v. *Luckenbach Overseas Corporation*, 425 F.2d 1130 (2d Cir. 1970). As pointed out by this Court in *Fairmount Glassworks* v. *Cub Fork Coal Co., supra*, the formulation of this rule is rooted in this Court's interpretation of the Section 22 of the Judiciary Act of 1789,[13] which provided that there be "no reversal in either [circuit or supreme] court on such writ of error . . . for any error in fact." This Court went on to state:

> Sometimes the rule has been rested on that part of the Seventh Amendment which provides that "no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." [footnote omitted.] More frequently the reason given for the denial of review is that the granting or refusing of a motion for a new trial is a matter within the discretion of the trial court. [287 U.S. at 482].

The re-examination of facts found by a jury is permitted the district courts since such power was exercised by the English common law courts and is therefore embraced by the Seventh Amendment [*Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F.2d 350, 353-354 (4th Cir. 1941)]. The function and proper role of the Court of Appeals is limited to reviewing a trial court's

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13 Act of September 24, 1979, chap. 20, 1 Stat. at L84, 85.

decision for errors of law or abuse of discretion. See, *Stevenson* v. *Hearst Consol. Publications, Inc.*, 214 F.2d 902, 910 (2d Cir. 1954). In the instant case, the Court of Appeals identified no such error of law or abuse of discretion. To the contrary, it upheld the district court's consideration of respondent's discretion as a permissible head of comparative negligence [688 F.2d at 904, App. A-9] and acknowledged that the district court judge was acting within his broad discretion in finding that the jury's attribution of but 4% fault to plaintiff was seriously erroneous so as to require a new trial [*Id.*].[14]

Upon reaching that point in its analysis, the Court of Appeals had no choice but to *affirm* the district court's granting of a new trial. Such affirmance would have precluded the district court judge from reconsidering his decision to grant a new trial since the appeals court's affirmance would have made it the law of the case, *United States ex rel. GREENHALGH* v. *F.D. Rich Co., Inc.*, 520 F.2d 886, 889 (9th Cir. 1975). Instead, the court went on to offer its own review of the facts, positing that the jury's aberrant verdict might have been justified by respondent's carelessness in performing the task as opposed to his negligent exercise of discretion as to *when* to perform it. In support of this theory, the Court of Appeals seized upon a bare scrap of testimony which, viewed in context of the entire trial and particularly respondent's difficulty with the English language, did not mean at all what the Court of Appeals thought.[15] It is signifi-

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14 It was the district court, not the Court of Appeals, which initially cited *Morgan* v. *Consolidated Rail Corp.*, 509 F. Supp. 281 (SDNY 1980) for the proposition that courts should be reluctant to overturn a jury finding of negligence in an FELA [Jones Act] case. See 521 F. Supp. at 48 [App. C-4].

15 The testimony in question was taken from respondent's cross-examination during which petitioner was attempting to demonstrate that in fact respondent could not say why he had slipped and therefore could not say that it was because of spray on deck or wind or seas (as respondent's expert witness was later to testify). Thus, when asked what caused his foot to come off the pedestal respondent replied:

cant that the district court, in reviewing and reconsidering its earlier decision in accordance with the Court of Appeals' direction, was of the opinion, based on its "feel" of the case, that in fact the jury did *not* attribute 4% fault to plaintiff based upon this "explanation" by the Court of Appeals.

If the Court of Appeals had itself reinstated the jury verdict on the basis of a holding that the district court had made an error of fact and that 4% comparative fault was justified on the "conduct of the work" theory noted above, there would be no question but that the court had exceeded its powers by reviewing the very matters which were exclusively within the discretion of the trial judge. Petitioner submits that the fact that the Court of Appeals remanded the case with a direction to the trial judge to consider the "conduct of the work" theory was no less without its powers. This is not to say that a Court of Appeals cannot, for purposes of guidance in future cases, advise trial courts that the Court of Appeals might have decided the matter differently *if it had been theirs to decide.* Mistakes should surely be cautioned against. But this is a different matter entirely from what was done in this case—where the Court of Appeals issued an advisory opinion to be acted upon by the district court, not in some future case, but in the case under appeal.[16]

"because it was wet or the sea . . . the ship slightly rolling, just plain slip" [688 F.2d at 905, n. 4; App. A-10, n. 4]. In elaborating upon why he was uncertain what had occurred, respondent testified that he was not *looking* at his foot ("I didn't watch my foot") at the time it slipped: "that's why I say I don't know why" [*Id.*]. The Court of Appeals apparently interpreted respondent's "I didn't watch my foot" as equivalent to "I didn't watch my step" and therefore indicative of carelessness for that reason on his part. What the court perhaps did not appreciate (as did the district court *and* the jury) was that respondent, born and reared in Russia, had limited command of English nuance.

16 That the decision was advisory only (as opposed to the Court of Appeals seeking clarification in order to determine whether the district court had abused its discretion) is proven by the *prospective* affirmance whatever the result of the renewed exercise of discretion by the district court.

The trial court judge was told: (a) to reconsider his initial decision and (b) to consider it in light of the suggestions made by the Court of Appeals. Any difference between this type of interference with the discretion of the trial judge and the kind which would result from a direct reversal without any remand is, we submit, more apparent than real. In both cases, the Court of Appeals has impermissibly reviewed facts found by a jury; in both, it has acted upon a matter within the sole discretion of the trial court.[17]

In light of the recent decision of the district court, reversing itself on the order to grant a new trial, the *ultra vires* opinion of the Court of Appeals is no longer only of theoretical concern. Review of the district court judge's most recent opinion [App. F] demonstrates that he was powerfully influenced by the advisory opinion of the Court of Appeals in exercising whatever remained of his discretion.[18] This case,

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17 In its petition for rehearing and suggestion for rehearing *en banc*, petitioner urged the Court of Appeals to recall its decision on this basis. The same argument was made to the district court in connection with its reconsideration of its earlier opinion. Understandably, the district court felt bound to follow the directive of the Court of Appeals.

18 For example, in noting that he must give "further consideration" to whether the jury's assessment of respondent's fault was against the weight of the evidence, the district court states: "[t]hat task necessitates a review of the pertinent evidence, *with a proper deference to those portions of Judge Newman's opinion which analyze it.*" [App. F-2, emphasis added.] After quoting the entire portion of the Court of Appeals' decision concerning this aspect of the case, the district court continues: "[a]gainst this background, I first consider whether or not, in light of the entire evidence *and the Court of Appeals' analysis of the theories of contributory negligence revealed by the evidence,* the jury's assessment of a four percent factor is against the weight of the evidence" [App. F-5, 6; emphasis added.] Perhaps not surprisingly, the district court judge went on to conclude that a 4% factor was "justified" for the "work performance" theory of comparative fault [App. F-7] although additionally stating that his own "feel" for the case led him to believe that it was in fact the "continuing-to-work" theory that was the basis of the jury's finding of comparative fault [App. F-11]. The district court then proceeded to reverse itself on its original holding that respondent's discretion, or his failure to exercise it, could not constitute but 4% contributory negligence.

then, raises issue whether the constitutional proscription against re-examination of facts found by a jury can be circumvented if a court of appeals "advises" a district court as to how it might have "better" evaluated those matters within its exclusive discretion.

C.

THE ISSUES OF LIABILITY AND DAMAGES WERE INSEPARABLE AND THE COURT OF APPEALS ERRED IN AFFIRMING THIS ASPECT OF THE DISTRICT COURT'S DECISION.

While noting that this Court has held that it would rarely be proper to allow a jury in a Jones Act or FELA case to consider the issues of damages and contributory negligence separately (*Norfolk Southern Railroad Co.* v. *Ferebee*, 238 U.S. 269, 273 (1915)), the Court of Appeals was of the opinion that this case was the "rare" instance in which an exception to that rule should apply. This is troublesome in view of the fact that save for *Landry* v. *Two R. Drilling Co.*, 511 F.2d 138 (5th Cir. 1975) there is *no* case where, despite a mistake in determination of the liability question, a jury's damage verdict has been retained.

We would submit that the courts since 1915 have routinely confronted circumstances where they were convinced absolutely of the correctness of the jury's damage award, yet have ordered complete new trials in comparative negligence cases on account of an error in determination of liability. Moreover, like the district court below, the Court of Appeals does not appear to have considered whether "the error which has crept into one element of the verdict did not affect the determination of [a]nother issue," *Thompson* v. *Camp*, 167 F.2d 733, 734 (6th Cir.), *cert. den.*, 335 U.S. 824 (1948), and seemed satisfied with an explanation [688 F.2d at 906, n. 5; App. A-12, n. 5] that the jury may have disregarded the court's instruction on *both* the damages and contributory negligence issues.

But even if this polarized jury did not *also* err in fixing damages, there is nevertheless compelling reason to order a new trial on all issues. It is axiomatic that one of the elements necessary to a finding of liability for negligence is "actual loss or damage resulting to the interest of another." Prosser, *Law of Torts*, 4th Ed., p. 143. As the district court acknowledged, it was petitioner's position that "whatever symptoms plaintiff had suffered, or was suffering from, resulted from other physical conditions and maladies, not related to the alleged accident" [521 F. Supp. at 47, App. C-3]. In short, petitioner claimed with reason that respondent had suffered *no* damages. This case is, thus, *the* "rare" instance where there can be *no* question that damages and liability *are* completely *in*separable.

The press of litigation in the courts is well known and the reluctance to order new trials is understandable. But concern for efficiency should not be permitted to override basic fairness. *Donovan*, *supra*, 536 F.2d at 538 (dissenting op. Feinberg, J.). This court in *Gasoline Products Co.* v. *Champlin Refining Co.*, *supra*, emphatically indicated that partial retrials may not properly be resorted to "unless it *clearly appears* that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." [283 U.S. 494 (1931) at 500; emphasis added.] This, would seem to mean simply that the "without injustice" requirement is to be *measured by* whether the issues *are* distinct and separable. The decision of the Court of Appeals, in affirming the district court's order for a new trial on liability issues only, completely ignores this central consideration of separability, focusing instead on the fact that the jury, by special verdict, indicated both aggregate damages as well as damages discounted for respondent's comparative fault.[19] In essence, the

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19 Thus, the court held [688 F.2d at 906, App. A-13]:

> In this case, a new trial, if one is held, need not reconsider damages. Because Judge Haight submitted detailed interrogatories to the jury, following substantially the form suggested in *Rivera*, *supra*, 474 F.2d at 259 n.5, we know the jury's determination of aggregate damages suffered by the plaintiff, as well as their view of how much

Court of Appeals seems to be saying that the issues of damages and contributory negligence are separable whenever the jury has found them separately and, by extension, that the older cases (enjoining against partial new trials on these issues in Jones Act or FELA cases) which did not employ special verdicts are therefore distinguishable. This, we submit, represents an emphatic abandonment of the standard set by this Court in *Gasoline Products Co.* v. *Champlin Refining Co.*, *supra*: the analysis of the Court of Appeals begs completely the question as to whether the issues are distinct and separable so that a second jury can fairly retry one without the other. The special verdict requiring the jury to make *findings* separately—which enables a reviewing court to ascertain whether a jury has erred on a particular issue—is completely irrelevant for purposes of determining whether that issue may properly be retried separately. For that, the facts of the case must be examined, an exercise from which the Court of Appeals pointedly abstained.[20]

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of a discount should be applied because of contributory negligence. Armed with these specific findings, the District Court acted within its discretion in excluding the issue of damages from retrial. *Cf. Landry* v. *Two R. Drilling Co.*, 511 F.2d 138, 143 n.4 (5th Cir. 1975) (court accepted 20% contributory negligence factor from first trial and limited retrial on question of damages). Although it is possible that the jury's special verdicts encompassed some undisclosed compromise, absent obvious inconsistencies we will not presume that the jury's findings represent anything other than good faith responses to the questions presented. As Judge Haight has already determined that the jury's determination of damages is supported by the evidence, we conclude that damages need not be reconsidered at retrial.

20 The Court of Appeals makes no reference, for example, to petitioner's argument that one of the aspects of its defense *on liability* was that respondent had suffered *no damages*.

CONCLUSION

This Court is confronted with a case in which the Court of Appeals authored an advisory opinion, after, by excision of the improper remittitur, it had deprived itself of jurisdiction to consider an appeal from what was then a non-final order. Faced with no choice but to affirm the grant of a new trial, the Court of Appeals unconstitutionally asked the district court to reconsider its exercise of discretion on the basis of what proved an invalid suggestion, not a reasoned conclusion, that there *might* have been a mistake made by the district court in assessing facts found by the trial jury.

Responding to the impairment of its discretion by the Court of Appeals, the district court recalled its prior opinion and ordered entry of judgment for very significantly more than that sum to which respondent had consented. A mistaken concern for "judicial economy" led the courts below to ignore their Constitutional mandates, the Judiciary Act of 1789 and three decisions, at least, of this Court: *Donovan* v. *Penn Shipping Co., Inc.*, 429 U.S. 648 (1977); *affirming per curiam*, *Donovan* v. *Penn Shipping Co., Inc.*, 536 F.2d 536 (2d Cir. 1976); *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), and *Norfolk Southern Railroad Co.* v. *Ferebee*, 238 U.S. 269 (1915).

This case is *the* extreme example of a Court of Appeals "so far departing from the acceptable and usual course of judicial proceedings . . . as to call for an exercise of the Court's power of supervision." S. Court Rule 17.1(a). In both determining it had jurisdiction to "entertain" respondent's cross-appeal and in re-examining facts found by the jury by purportedly reviewing the district court's opinion for errors of fact, the district court: ". . . decided a federal question in conflict with an applicable decision of this Court." S. Court Rule 17.1(c). Judicial activism of this kind must be discouraged if there is to be any predictability to the law.

Dated: New York, New York
January 25, 1983

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Argued May 12, 1982 Decided Sept. 14, 1982

Nos. 1088, 1089, Dockets 81-7833, 81-7873

CARL O. AKERMANIS,

Plaintiff-Appellee-Cross-Appellant,

—v.—

SEA-LAND SERVICE, INC.,

Defendant-Appellant-Cross-Appellee.

Joseph T. Stearns, New York City (Sandra R.M. Gluck and Walker & Corsa, New York City, on the brief), for defendant-appellant-cross-appellee.

Steven Thaler, New York City (Markowitz & Glanstein, New York City, on the brief), for plaintiff-appellee-cross-appellant.

Before FEINBERG, Chief Judge, and NEWMAN and WINTER, Circuit Judges.

NEWMAN, Circuit Judge:

This appeal concerns primarily the issue, apparently one of first impression in the federal courts, whether a trial judge may use the device of a new trial order conditioned on a remittitur to increase a jury's determination of the percent of responsibility for an injury that is attributable to a plaintiff's contributory negligence. That device was employed in this suit under the Jones Act, 46 U.S.C. § 688 (1976), brought by plaintiff Carl O. Akermanis, an injured seaman, against defendant ship-

owner Sea-Land Service, Inc. After plaintiff agreed to the remittitur, the District Court for the Southern District of New York (Charles S. Haight, Jr., Judge) entered judgment on November 17, 1981, in favor of the plaintiff. 521 F.Supp. 44. Defendant appeals, contending that it is entitled to an unconditional order for a new trial. Plaintiff cross-appeals, seeking an increased judgment based on the jury's initial determination as to the share of responsibility attributable to his negligence. For reasons that follow, we conclude that a remittitur may not be used to adjust a jury's contributory negligence percentage, and we therefore reverse and remand for further proceedings.

In the spring of 1977, Akermanis was a third assistant day engineer aboard Sea-Land's vessel S/S Los Angeles during a voyage from Greece to Rotterdam. One of the plaintiff's duties was to replace deteriorated angle irons on pedestals used to secure the vessel's deck cranes. At trial, Akermanis contended that the defendant's negligence caused him to injure himself while working on these pedestals. Although there was conflicting evidence, Akermanis testified that on June 4, 1977, his superiors instructed him to work on the deck burning off a rusted pedestal bracket, despite rolling seas and a deck slippery from the ocean's spray. According to the plaintiff, as a result of these unsafe working conditions, he lost his balance, hit his head against the pedestal, and hurt his back when his head was snapped backwards as he fell. The accident was said to have severely injured Akermanis' cervical spine and forced his early retirement from the merchant marine.

Sea-Land Service contested almost all of Akermanis' allegations. First, Sea-Land claimed that Akermanis' injuries stemmed not from an accident aboard the Los Angeles, but rather from several preexisting ailments. Second, Sea-Land contended that it was in no way to blame for the condition of the Los Angeles on June 4, 1977, that Akermanis had not been ordered to work on the pedestal bracket at any particular time, and that any risks Akermanis faced while working on the deck were inherent in the life of a seaman. In addition, Sea-Land raised the defense of contributory negligence, arguing that, if working on the pedestal was unsafe, Akermanis, who was 59

years old and had 30 years of maritime experience at the time of the accident, should have been able to appreciate the danger and rearrange his schedule to work below deck until the weather cleared. According to the defendant, Akermanis had considerable discretion in scheduling his work. Moreover, counsel for Sea-Land suggested that the alleged accident was more likely the result of Akermanis' carelessness in doing his job than any fault of the defendant. Finally, Sea-Land introduced evidence through a series of expert witnesses that contradicted the testimony of Akermanis' doctors as to the extent and cause of his spinal injuries.

In response to a special verdict form, the jury found that Sea-Land was negligent, that its negligence was a proximate cause of Akermanis' June 4, 1977, accident, and that as a result of the accident, Akermanis suffered damages totaling $528,000. The jury further found that Akermanis also was negligent and that the share of responsibility attributable to his negligence was four percent.

Following the jury's verdict, Sea-Land moved for judgment notwithstanding the verdict or, in the alternative, for a new trial, pursuant to Fed. R. Civ. P. 50(b). After reviewing the record, Judge Haight concluded that there was sufficient evidence to support the jury's findings that negligence on the part of the defendant caused the plaintiff's injuries. Because it was not " 'clear that the jury had reached a seriously erroneous result,' " *Bevevino* v. *M.S. Saydjari*, 574 F.2d 676, 684 (2d Cir. 1978) (quoting 6A *Moore's Federal Practice* ¶ 59.08[5], at 59—160 to —161 (1973)), the District Court denied defendant's motion for judgment notwithstanding the verdict [sic], see *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532, 538 (2d Cir. 1965) (evidence must be viewed most favorably for the defendant on j.n.o.v. motion), *cert. denied*, 382 U.S. 983, 86 S.Ct. 559, 15 L.Ed.2d 472 (1966), and declined to order a new trial of all the issues.

Judge Haight then considered the jury's finding that plaintiff's contributory negligence was a four percent cause of the accident, and concluded that the selection of this percentage was against the weight of the evidence, in his view a "clear and

serious error." While he agreed that it was reasonable for the jury to determine that Sea-Land's negligence was the major cause of the accident, he rejected four percent as the measure of plaintiff's share of responsibility. His reasoning is set forth in his memorandum opinion. He first assumed that the jury's finding of plaintiff's contributory negligence was based on their acceptance of defendant's evidence that Akermanis had some discretion to determine when he would work on the ship's pedestals and had exercised that discretion without using reasonable care. Judge Haight then determined that a factor of only four percent for contributory negligence of this sort was against the weight of the evidence and so substantially below jury determinations in similar Jones Act cases as to warrant a new trial. After referring to cases cited at 44A *Modern Federal Practice Digest* Seamen § 29(4)(H) (West 1968), he concluded that the lowest contributory negligence factor the evidence would support was 25 percent. He therefore ordered a new trial on liability issues, but with the condition that the defendant's motion for new trial would be denied if the plaintiff would accept a "remittitur" of damages based on an increase of the contributory negligence factor from four to 25 percent. The plaintiff accepted, and judgment was entered in favor of the plaintiff for 75% of the jury's determination of the total amount of damages suffered.

I.

We consider first Sea-Land's appeal, which challenges the District Court's authority to use the device of a remittitur to adjust the jury's determination of the contributory negligence percentage. Remittitur is a limited exception to the sanctity of jury fact-finding. It allows trial judges to reduce damages, but only when an award is grossly excessive. As the Supreme Court has stated, this exception is justified because, "[w]here the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping

off an excrescence," *Dimick* v. *Schiedt*, 293 U.S. 474, 486, 55 S.Ct. 296, 301, 79 L.Ed. 603 (1935). But in *Dimick*, the Supreme Court made clear that remittitur was not an expansive doctrine: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Id.*

In giving that scrutiny to the use of remittitur in this case, we note a fundamental difference between the use of remittitur to decrease a determination of damages and its use here to increase a contributory negligence percentage. Though both have the same ultimate consequence of reducing the amount of the judgment that the plaintiff is invited to accept as the price of avoiding a new trial, the means by which the reduction is accomplished differ in a way that is critical to determining the lawfulness of the technique. A conditional reduction of a damage calculation leaves in the judgment a portion of what the jury awarded, a circumstance that the Supreme Court considered crucial to its willingness to permit remittitur while rejecting additur in *Dimick*. In this case, however, the conditional adjustment of the contributory negligence percentage inserts into the judgment something beyond what the jury found: a conclusion that the plaintiff's negligence was responsible for a greater share of the accident than the jury had thought. In *Dimick*, the four dissenters thought it was needlessly artificial to deny a trial judge the authority to condition a new trial order on payment of an additur while permitting him to use the device of remittitur. In either circumstance, they argued, the judge is simple conditioning the new trial order on the minimum adjustment necessary to render the verdict within the bounds of reasonableness. But their view did not prevail. We are therefore obliged to apply the rationale of the *Dimick* majority, which, as we understand it, precludes any adjustment that extends a jury's finding, even if that extension results in a reduced monetary judgment.[1]

1 It could be argued that the type of remittitur permitted by Judge Haight should be allowed since the increase in the contributory negligence factor can be accomplished only with the consent of the plaintiff, whose

We have located only one case in which a trial court attempted to use the remittitur device to adjust a jury's contributory negligence assessment, and that decision did not survive appellate review. In *Ferguson* v. *Chester A. Poling, Inc.* 285 N.Y.S. 340, 247 A.D. 727 (2d Dep't 1936) (per curiam), also a Jones Act case, the jury found that the plaintiff had suffered damages of $25,000, and then reduced this sum by $5,000 because the plaintiff's contributory negligence was a 20 percent cause of the accident. The trial court thought the lowest reasonable contributory negligence factor was 60 percent and therefore ordered a new trial unless the plaintiff agreed to a reduction in the judgment from $20,00 to $10,000. The Appellate Division reversed because "the question of apportioning the negligence was peculiarly within the province of the jury." *Id.* at 341, 247 A.D. at 728. We agree with the New York court that a jury's apportionment of responsibility in a Jones Act case is not subject to adjustment by the device of a remittitur. In *Ferguson* the Appellate Division ordered judgment upon the jury's fact-finding. Whether that result or a new trial is warranted here requires consideration of plaintiff's cross-appeal.

II.

A. In considering the plaintiff's cross-appeal, we face the threshold issue of whether we have appellate jurisdiction. This Circuit has followed the majority rule that a plaintiff who accepts a remittitur may not appeal from a judgment entered upon the reduced award. *Donovan v. Penn Shipping Co.*, 536 F.2d 536 (2d Cir. 1976), *aff'd per curiam*, 429 U.S. 648, 97 S.Ct. 835, 51 L.Ed. 2d 112 (1977); *Evans v. Calmar Steamship*

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share of fault is being enlarged. However, it was equally true in *Dimick* that the increase in the amount of damages sought to be achieved by the use of additur could have been accomplished only with the consent of the defendant, who would have paid the increase. The Supreme Court's rejection of additur, indeed, its grudging acceptance of remittitur, 293 U.S. at 484, 55 S.Ct. at 300, suggests that jury determinations are not to be enlarged upon, even with the consent of the party thereby disadvantaged.

Co., 534 F.2d 519 (2d Cir. 1976). And we have also dismissed the cross-appeal of a plaintiff who accepted a remittitur, even though we adjudicated the merits of the defendant's appeal from the judgment entered upon the reduced award. *Mattox v. News Syndicate Co.*, 176 F.2d 897, 904 (2d Cir.) *cert. denied*, 338 U.S. 858, 70 S.Ct. 100, 94 L.Ed. 325 (1949). *But see Burris v. American Chicle Co.*, 120 F.2d 218, 223 (2d Cir. 1941) (questioning appealability but reaching merits of cross-appeal). That rule, whatever its merit, *see Donovan v. Penn Shipping Co., supra*, 536 F.2d at 538 (Feinberg J. (now C.J.), dissenting); *Reinertsen v. George W. Rogers Construction Corp.*, 519 F.2d 531 (2d Cir. 1975), does not necessarily preclude our exercise of jurisdiction over Akermanis' cross-appeal. The rationale of *Donovan v. Penn Shipping Co., supra*, appears to be two-fold: waiver and efficiency. The plaintiff who has accepted a remittitur, even if the acceptance was under protest, will not be heard to complain, and allowance of such appeals would add to the burdens of courts.

Neither rationale applies here. Now that we have adjudicated Sea-Land's appeal and agreed with appellant that the District Judge lacked the power to condition the new trial order on a remittitur adjusting the contributory negligence percentage, the first step in ordering relief with respect to the appeal is, as Sea-Land requests, to vacate the judgment entered upon the reduced award on the ground that its entry was erroneous. Once we do that, it is conceptually difficult and pratically unfair to think of the plaintiff as having waived a cross-appeal by consenting to a judgment that no longer exists. The rationale of court efficiency does not disappear, but it becomes less persuasive. Normally, when an appellate court dismisses the appeal or cross-appeal of a plaintiff who has accepted a remittitur, the burden on the court system is reduced because there will be neither an appeal nor a new trial. That is not true in this case. If we dismiss the cross-appeal and simply return the case to the District Court for a new trial, now that the conditional aspect of the new trial order has been excised, there would clearly be less of a burden on this Court. But that course would add considerably to the burden on the District

Court, which would have to conduct a trial that the cross-appellant is prepared now to show us should never have been ordered. What we really face is an issue that has nothing to do with acceptance of a remittitur: whether a cross-appeal will lie as to a non-final order for a new trial when the main appeal from a final judgment has already brought the case to an appellate court.

That is similar to the situation that arises under Fed. R. Civ. P. 50(c) when a trial court grants a motion for judgment n.o.v. and also, as required by Rule 50(c), conditionally grants a motion for a new trial. Upon appeal of the judgment by the party that wants judgment entered on the verdict, Rule 50(c) provides that if the judgment is reversed, "the new trial shall proceed unless the appellate court has otherwise ordered." This provision, which the Advisory Committee explains was not intended to alter the scope of appellate review, *see* Fed. R. Civ. P. 50 advisory committee note, contemplates that an appellate court, after vacating the judgment n.o.v., may then review the trial court's ruling conditionally granting a new trial and "otherwise order[ ]" that the new trial not be held. The result is review of a new trial order that would not have been appealable, if not accompanied by the granting of a motion for judgment n.o.v., until entry of judgment after retrial. *See Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835, 90 S.Ct. 93, 24 L.Ed.2d 85 (1969). Even more analogous is the procedure authorized by Rule 50(d), which applies when appeal is taken by a party whose motion for judgment n.o.v. was denied. If that party prevails on its appeal from the judgment entered upon the verdict, the appellee is entitled to urge the court of appeals to order a new trial, rather than order the entry of judgment n.o.v. *See Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 329, 87 S.Ct. 1072, 1080, 18 L.Ed.2d 75 (1967) (making clear that court of appeals can consider the new trial request apart from the authority of Rule 50(d)). Our case in an amalgam of the situations contemplated by Rules 50(c) and 50(d): like the 50(c) appellant, Akermanis wants to be heard in opposition to the trial court's grant of a new trial, but he is not the party who

appealed the judgment; like the 50(d) appellee, he is the adversary of the party who appealed the judgment, but he is opposing, rather than supporting, an order for a new trial.

The situations contemplated by Rules 50(c) and 50(d) are variations of the general authority of a court of appeals, upon vacating a judgment, to "require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106 (1976). The circumstances of this case are unusual, to say the least. We need not and do not consider the full range of otherwise interlocutory rulings that an appellee would like to urge an appellate court to consider upon his adversary's successful appeal from a final judgment. But we think it is entirely appropriate to entertain the cross-appeal in this case. Doing so is in keeping with the spirit of Rules 50(c) and 50(d) and, as will be seen in Part II(B), *infra*, affords us the opportunity to focus the District Court's attention on matters that may obviate the need for a new trial or at least limit its scope. We therefore turn to the cross-appeal.

B. In granting the defendant's motion for a new trial, Judge Haight reasoned that the jury's finding of contributory negligence was based on a conclusion that Akermanis had the authority to schedule his own work and that he exercised poor judgment by agreeing to work on the Los Angeles' deck on June 4, 1977, when he might have deferred the task to another day.[2] If that was the jury's conclusion, then, based on the evidence presented at trial, Judge Haight was acting within his broad discretion in ruling that a finding of only four percent contributory negligence was against the weight of the evidence and that a new trial should be granted.[3]

2 As the District Court correctly noted, under the Jones Act, negligence requires more than knowledge of a hazard; it entails failure to adopt safer alternative courses of action. *See Tolar v. Kinsman Marine Transit Co.*, 618 F.2d 1193, 1196 (6th Cir. 1980); *Rivera* v. *Farrell Lines, Ltd.*, 474 F.2d 255, 257-58 (2d Cir.), *cert. denied*, 414 U.S. 822, 94 S.Ct. 122, 38 L.Ed.2d 55 (1973). Inquiry at the trial properly centered on what choices were available to Akermanis and how he exercised those choices.

3 Indeed, if the jury thought that Akermanis was negligent in electing to do his work at the time of the accident, there is at least a superficial

It is possible, however, that the jury's finding of contributory negligence was not based on a conclusion that Akermanis chose to work on the pedestal that day. The jury might have concluded that Akermanis was directed to work on the pedestal at the time of the accident, but that he was negligent in the manner in which he performed his work. During cross-examination, Akermanis admitted that his own preoccupation with burning the bracket might have contributed to the accident.[4] During his summation, counsel for the defendant reviewed the events surrounding Akermanis' accident "was something due to, perhaps, a momentary lapse of carefulness on his part." If the jury was focusing on the plaintiff's manner of working at the time of the accident, it is arguable that they considered Akermanis' work performance to be negligent but that such negligence represented only a slight percentage of the cause of the accident. In his memorandum opinion, Judge Haight gave no explicit consideration to this possible explanation for the jury's contributory negligence factor of four percent.

Ordinarily, we might not be so concerned that a trial judge explicitly consider every possible justification for a jury's

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inconsistency with the finding that the defendant was negligent in ordering him to do the work at that time. But inconsistency is not inevitable. The jury may have thought that the defendant had negligently instructed him to work at that time, but not in the form of such an absolute order as to preclude Akermanis from exercising care in deciding whether to do the work or at least whether to call to his superiors' attention the risks of doing the work at that time. In any event, it is a function of the comparative negligence doctrine to permit the jury to reconcile conflicting versions of an episode.

4 Akermanis' testimony on cross-examination included the following:

> Q. Sir, in fact, do you know why your foot came off the pedestal?
>
> A. Because it was wet or the sea—the ship slightly rolling just plain slip.
>
> . . . .
>
> Q. You don't know why?
>
> A. Why? It could be the ship's rolling. I don't know why.
>
> Q. Sir—
>
> A. *I was concentrating on my work, right. I was interested to cut off that thing. I didn't watch my foot.* The foot was standing there. I slipped while I working and the ship moved, the foot slipped. That's why I say I don't know why [emphasis added].

verdict before concluding that a verdict is against the weight of the evidence and ordering a new trial. But this case arises under the Jones Act, and jury findings under that Act, which incorporates standards of the FELA, are particularly resistant to being overturned. *See Morgan v. Consolidated Rail Corp.*, 509 F.Supp. 281, 285 (S.D.N.Y. 1980). Because we recognize that a trial judge, with a "feel" of the case, *Neely v. Martin K. Eby Construction Co., supra,* 386 U.S. at 325, 87 S.Ct. at 1078, is normally in the best position to determine whether a verdict is against the weight of the evidence, we prefer to have Judge Haight consider whether the "work performance" theory of contributory negligence finds enough support in the evidence, assessed in the context of the entire trial, to justify the four percent factor. If he concludes it does not, then his order for a new trial will stand. Even if he concludes that the "work performance" theory alone *would* support a four percent factor, then Judge Haight will have the option of either entering judgment for the plaintiff on the jury's damage computation, reduced by only four percent, or ordering a new trial. This latter option remains a possibility because of an intimation in Judge Haight's opinion that he thinks the jury would have committed serious error if they had not attributed at least part of the responsibility for the accident to Akermanis for continuing to work on deck despite the inclement weather and unsafe conditions. In other words, Judge Haight may find that the "work-performance" theory justifies a four percent factor, but that Akermanis' negligence in continuing to work is so strongly supported by the evidence that a verdict assessing his share of fault at only four percent is against the weight of the evidence, whether or not the jury based its findings of contributory negligence on the "continuing-to-work" theory. In short, the District Judge, upon remand, has discretion whether or not to order a new trial.

If the District Court decides that a new trial is necessary to determine the extent of Akermanis' contributory negligence, there will remain a question as to the proper scope of the retrial. Rule 59(a) permits partial retrial of distinct issues but the trial court must examine whether a jury's award of dam-

ages and its finding of liability are sufficiently separate to allow a partial new trial as to liability issues. *See Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500, 51 S.Ct. 513, 515, 75 L.Ed. 1188 (1931) (Partial retrial "may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from others that a trial of it alone may be had without injustice."). In its memorandum opinion, the District Court indicated that, if a new trial were necessary, it would be limited to questions of liability. Defendant contends that any retrial should include redetermination of damages since the jury might have perceived comparative negligence as closely related to damages and might have allowed its determination of damages to be influenced by its erroneous finding of relative fault.[5]

Courts have been reluctant to hold a new trial on contributory negligence without also retrying damages. *See Rivera v. Farrell Lines, Inc.*, 474 F.2d 255, 259 (2d Cir.) (Jones Act case), *cert. denied*, 414 U.S. 822, 94 S.Ct. 122, 38 L.Ed.2d 55 (1973); *cf. Norfolk Southern Railroad Co. v. Ferebee*, 238 U.S. 269, 273 35 S.Ct. 781, 782, 59 L.Ed. 1303 (1915) (it would rarely be proper to allow a jury to consider a question of damages without also submitting the issue of contributory negligence). But this reluctance has been expressed in cases like *Rivera*, where the form of the jury verdict left the court "in the dark as to what the total award would have been absent the finding of contributory negligence and the extent to which that finding affected the verdict." *Rivera, supra*, 474 F.2d at 259. The jury in that case had reported a finding of contributory negligence, but had not been asked to report the percent of responsibility it

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5 While it is understandable that the defendant would prefer a second opportunity to persuade a jury to return a modest damage award, the logic of the argument is unclear: if the jury had determined the amount of damages in relation to their contributory negligence percentage, the setting of a low percentage would indicate that, if anything, damages had been scaled *down* from what they might have been had the contributory negligence factor been high. In this circumstance, it would normally be the plaintiff, not the defendant, who might have a claim that damages should be retried in the event of a retrial as to contributory negligence.

attributed to plaintiff's contributory negligence. However, when a jury arrives at its decision by detailed special verdicts, enabling a trial or a reviewing court to be reasonably certain that an erroneous verdict was reached independent of another verdict, a partial retrial may be in order. *See, e.g., Ferebee, supra.*

In this case, a new trial, if one is held, need not reconsider damages. Because Judge Haight submitted detailed interrogatories to the jury, following substantially the form suggested in *Rivera, supra,* 474 F.2d at 259 n. 5, we know the jury's determination of aggregate damages suffered by the plaintiff, as well as their view of how much of a discount should be applied because of contributory negligence. Armed with these specific findings, the District Court acted within its discretion in excluding the issue of damages from retrial. *Cf. Landry v. Two R. Drilling Co.,* 511 F.2d 138, 143 n. 4 (5th Cir. 1975) (court accepted 20% contributory negligence factor from first trial and limited retrial to question of damages). Although it is possible that the jury's special verdicts encompassed some undisclosed compromise, absent obvious inconsistencies we will not presume that the jury's findings represent anything other than good faith responses to the questions presented. As Judge Haight has already determined that the jury's determination of damages is supported by the evidence, we conclude that damages need not be reconsidered at retrial.

In his opinion conditionally ordering a new trial, Judge Haight indicated that the defendant is entitled to a new trial "on the question of contributory negligence," but the operative language of his order grants a new trial "on liability issues." The authority provided by Rule 59(a) for a new trial on "part" of the issues has been used by some courts with precision. *E.g., Higginbotham v. Ford Motor Co.,* 540 F.2d 762 (5th Cir. 1976). If Judge Haight determines that a new trial, if held, should be limited to the question of contributory negligence—both its existence and its percentage—he has discretion to narrow the retrial to that extent.[6] He might well conclude that

6 If this procedure were used, the jury would be told that defendant's negligence has already been determined and that their task is only to

since the retrial is occasioned because the first jury assigned too great a share of the blame to the defendant, Akermanis should not have to persuade the second jury that the defendant was negligent simply because he had made that demonstration too convincingly to the first jury.[7] On the other hand, the District Judge also has discretion to retry all the liability issues, if he concludes that a trial limited to contributory negligence would not, on balance, be fair to the parties.

We have considered the other issues raised by the defendant concerning evidentiary rulings and the instructions to the jury and find them to be without merit. Accordingly, the judgment is reversed, and the case remanded for further consideration consistent with this opinion.

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determine whether the plaintiff was contributorily negligent and, if so, to determine what percentage of responsibility for the accident is attributable to the plaintiff's contributory negligence. The parties would, of course, be entitled to present all evidence relevant to the fault of both parties in order for the jury to make an apportionment of fault.

7 In some situations, it might be inappropriate to order such a limited partial new trial. For instance, if in this case the jury's contributory negligence factor had been impermissibly high, then any retrial might have to encompass all aspects of liability: it might be unclear from such a verdict whether the jury really thought the defendant was liable or whether their finding of liability coupled with a high assessment of contributory negligence represented a compromise between factions. Similarly, if in this case the jury's award of damages as well as its assessment of contributory negligence had been low, then it might be necessary to afford the plaintiff the option to retry damages as well as liability: the jury might have discounted the damages to compensate for the plaintiff's contributory negligence.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 28 day of October, one thousand nine hundred and eighty-two.

No. 81-7833
81-7873

CARL O. AKERMANIS,

Plaintiff-Appellee-Cross-Appellant,

—v.—

SEA-LAND SERVICE, INC.,

Defendant-Appellant-Cross-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee-cross-appellant, Carl O. Akermanis.

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

s/ FRANCIS X. GINDHART

by FRANCIS X. GINDHART
Chief Deputy Clerk

STAMP
United States Court of Appeals, Second Circuit
Filed October 28, 1982
A. Daniel Fusaro, Clerk

UNITED STATES DISTRICT COURT
S. D. NEW YORK

Oct. 14, 1981

No. 77 Civ. 6131-CSH

CARL O. AKERMANIS,

Plaintiff,

—v.—

SEA-LAND SERVICE, INC.,

Defendant.

Markowitz & Glanstein, New York City, for plaintiff; Steven Thaler, New York City, of counsel.

Walker & Corsa, New York City, for defendant; Joseph T. Stearns, Sandra R. M. Gluck, New York City, of counsel.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

Plaintiff Carl Akermanis, a licensed marine engineer, brought this action against his former employer, defendant Sea-Land Service, Inc., to recover for damages allegedly caused by an accidental injury suffered on board defendant's vessel LOS ANGELES on June 4, 1977. The complaint stated causes of action for unseaworthiness, and for negligence under the Jones Act, 46 U.S.C. § 688. The Court dismissed the unseaworthiness claim at the conclusion of plaintiff's case. Defendant's motion to dismiss the negligence cause of action was denied, defendant offered evidence, and that cause of action was submitted to the jury in the form of a special

verdict. The jury found that defendant's negligence was a proximate cause of plaintiff's accident, and assessed damages of $150,000 for past pain and suffering, $100,000 for future pain and suffering, $160,000 for past lost earnings, and $118,000 for future lost earnings. The damages consequently totalled $528,000. Finally, the jury found that the contributory negligence of plaintiff contributed to the accident in the amount of 4%.

The Court entered judgment in plaintiff's favor for $489,514.61. This amount reflected the 4% reduction for contributory negligence, and a 2% discount on future damages, the parties having offered no proof on the relevant economic issues. *Doca v. Marina Mercante Nicaraguense,* 634 F.2d 30, 40 (2d Cir. 1980). The judgment bore interest at 6% per annum.

Defendant now moves pursuant to Rules 50 and 59, F.R.Civ.P., for an order granting defendant judgment n. o. v., or in the alternative a new trial, or in further alternative a remittitur. Plaintiff cross-moves to amend the judgment so as to provide for interest at 9%.

I.

Plaintiff was 59 years old at the time of the alleged accident. He had been going to sea since 1936. After service in the United States Navy, he obtained his first marine engineer's license in 1946, and, until the date of his accident, sailed continuously in the Merchant Marine since that time. He obtained a chief engineer's license in 1957. At the pertinent time, however, plaintiff was sailing on board defendant's vessel LOS ANGELES as a third assistant day engineer, having joined the vessel in that capacity on March 31, 1977.

The theory of plaintiff's case was that, on the morning of June 4, 1977, he was assigned to do burning and "finishing" work on deck. The LOS ANGELES was then on a voyage from Persian Gulf ports through the Mediterranean, bound for Rotterdam. On the date of the accident, she had passd through the Strait of Gibraltar, and was navigating in the North Atlantic. Plaintiff's work consisted of using a torch to burn off

the top of an iron pedestal, containing a deteriorated support bracket for a turnbuckle, which was in turn used to secure one of the movable cranes of the vessel while at sea. Plaintiff contended that the place in which he was working was unreasonably unsafe because the working of the vessel in the seas had wetted the decks with spray, rendering the deck area slippery. (Plaintiff, in his testimony, was not specific about the physical cause of the accident about to be related, but his contention through counsel, articulated throughout the case and advanced with the assistance of expert testimony at the trial, was that wind-blown spray from waves had rendered the deck area hazardous for work.) Plaintiff was working on top of hatch covers near the port edge of the coaming, between the number 9 and 10 hatches. He testified that as he was burning the top of the pedestal with his torch, he lost his balance, struck his head on the pedestal, and that then his head was jerked backwards as he fell. Plaintiff alleged a severe and permanent injury to his cervical spine, resulting in his inability to work again as a merchant seaman.

Defendant's theories of the case were (1) no accident had occurred, rather plaintiff was asserting a pretext to recover damages before retiring; and (2) whatever symptoms plaintiff had suffered, or was suffering from, resulted from other physical conditions and maladies, not related to the alleged accident.

Plaintiff testified at the trial. The chief officer and chief engineer of the vessel testified by deposition. In addition to these lay fact witnesses, there was an extensive amount of medical evidence. The medical evidence took the form of deposition testimony by plaintiff's post-accident treating physician, an orthopedist; hospital records relating to a number of hospitalizations of plaintiff and consequent treatment, both prior and subsequent to the accident; and the usual medical expert witnesses, retained by the parties to give evidence at the trial.

The opposing papers on the present motion rehearse at length the parties' contentions, factual, medical, and legal. In passing upon defendant's motion for judgment n. o. v. under

Rule 50(b), I must view the evidence in the light most favorable to plaintiff. The standard is different on a motion for a new trial under Rule 59; a new trial motion may be granted even if there is substantial evidence to support the jury's verdict, and the trial judge is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner. *Bevevino v. M.S. Saydjari*, 574 F.2d 676, 677, 683-84 (2d Cir. 1978). However, even within the Rule 59 context, the moving party must satisfy the trial judge that the verdict was contrary to the weight of the evidence; and the Second Circuit in *Bevevino* specifically approved the standard set forth by a leading commentator that the trial judge should "abstain from interfering with the verdict unless it is quite clear that the jury had reached a seriously erroneous result." *Id.* at 684, quoting *6A Moore's Federal Practice*, ¶ 59.08[5], at 59-160-59-161 (1973).

Implicit in this standard is the rule that "a trial judge should not act merely as a '13th juror' and set a verdict aside simply because he would have reached a different result had he been the trier of fact." *Borras v. Sea Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978). It has also been said that "courts have long been, and should be especially reluctant to overturn a jury finding of negligence in an F.E.L.A. case." *Morgan v. Consolidated Rail Corp.*, 509 F.Supp. 281, 285 (S.D.N.Y.1980), and cases cited. This last observation is pertinent because Jones Act cases are governed by F.E.L.A. principles.

Viewed in the light of these standards, defendant is not entitled to judgment n. o. v., or, with the exception of the contributory negligence issue discussed under Point II *infra*, to a new trial. The accident either occurred or it did not. Defendant argued that the evidence showed plaintiff did not report the incident, and that he had attained the level of full retirement benefits, from which defendant asked the jury to infer that plaintiff had invented the accident in order to finance a more comfortable retirement. The jury was entitled in law to draw that inference; but it was equally entitled to believe the plaintiff's account of what happened to him, as it clearly did. I do not regard the jury's conclusion as seriously erroneous.

Having observed plaintiff's demeanor and listened to his testimony, I do not believe that he fabricated the accident.

On the question of defendant's negligence, plaintiff's expert witness testified that the prevailing conditions of wave, wind, and the vessel's motion through the seas resulted in spray on the deck which rendered the area unsafe for the designated work. Plaintiff testified that the chief engineer directed him to perform the work. The chief officer's duties included supervision of work on deck with a view to safety. There is no basis, under either rule, to disturb the jury's finding that defendant's negligence contributed to the accident.

Finally, the jury was entitled to conclude, from the mass of medical evidence, that the accident caused an injury to plaintiff's cervical spine, permanent in nature, which, when superimposed upon whatever prior conditions plaintiff suffered from, constituted the cause of a permanent disability to work as a marine engineer. The Public Health Service treating physician, Dr. Miller, during the course of a lengthy deposition, gave such testimony (Dep. Tr. 87, 88, 95, 96); a comparable opinion was expressed by plaintiff's trial expert, Dr. Golub, who attached particular significance to a reversal of the upper cervical curve which he detected in the x-rays.

There was, of course, contrary evidence from the two medical expert witnesses defendant called at trial. The jury could have accepted those opinions; it could also have drawn certain of the inferences which defendant's counsel asked it to draw from plaintiff's voluminous medical history. But again, the jury elected not to do so; and it is a necessary function of lay jurors to choose between conflicting medical opinion. In addition, the jury was entitled to consider the fact, stressed by plaintiff's counsel in argument, that notwithstanding the previously existing conditions stressed by defendant, plaintiff had worked without significant interruption at sea for many years prior to the accident in suit. Defendant's riposte, as previously noted, was that plaintiff had decided it was time to retire, and wished to augment his pension. But the jury was also entitled to credit plaintiff's testimony—as did I—when, in responding to that suggestion by defendant's counsel on cross-examina-

tion, he stated in substance that he loved the sea, it was his home, he knew no other, he had not intended to retire, and badly missed going to sea.

These considerations are fatal to defendant's motion for judgment n. o. v. under Rule 50, on the questions of liability and causation discussed. Within the context of defendant's motion for a new trial under Rule 59, I could disturb the jury's findings on these issues only if I acted as an impermissible "13th juror," which I decline to do, because I am not persuaded that they were "seriously erroneous."

II.

The question of substance that arises, on this aspect of the motion, relates to the jury's finding of 4% contributory negligence. As noted *supra*, there is no basis for disturbing the jury's findings that the area in which plaintiff was working was unsafe by reason of spray on the deck, and that defendant's supervising officers, who directed plaintiff to perform this work, knew or should have known of the hazard. But defendant argued that plaintiff, a man of many years' experience at sea, and the holder of a chief engineer's license, was equally able to appreciate any danger, and that he could have, by an alternative course of conduct, avoided the danger.

To sustain a theory of contributory negligence, defendant was required to demonstrate something more than plaintiff's proceeding in the face of an apparent hazard. A theory of negligence, so limited, is the legal equivalent of the defense of assumption of the risk, which is not available in cases of this nature. *Rivera v. Farrell Lines, Inc.*, 474 F.2d 255, 257-58 (2d Cir. 1973). It is necessary for the defendant to demonstrate "an act of negligence other than [plaintiff's] knowledge of the dangerous condition," such as a failure to take an alternate route which would have avoided the hazard. *Id.* at 258. That is to say, "the defense of contributory negligence requires evidence of some negligent act or omission by the plaintiff other than his knowledgeable acceptance of a dangerous condition." *Tolar v. Kinsman Marine Transit Co.*, 618 F.2d 1193 (6th Cir. 1980), citing *Rivera, supra*. "A seaman may not be denied

recovery because he proceeds in an unsafe area of the ship or uses an unsafe appliance in absence of a showing that there was a safe alternative available to him." *Tolar* at 1195.

In the case at bar, defendant perceives the requisite safe alternative in plaintiff's testimony that the project of replacing the on-deck fittings had been going on for a period of a week, ten days, possibly longer than that; that plaintiff had been preparing some of the replacement fittings while the vessel was in the Mediterranean; and that the weather in the Mediterranean "was real beautiful then." It further appears from the evidence that plaintiff, while given a number of projects as assistant day engineer, exercised a considerable degree of personal control as to which project he would work upon at what time. It is further established from the evidence that the accident occurred on a Saturday, which was an overtime day, and that plaintiff was not required to work on that day at all, unless he wished to accrue overtime. From these facts, essentially undisputed, defendant argues that plaintiff could have performed this work while the vessel was still sailing in the beautiful weather of the relatively sheltered Mediterranean; or, the vessel having progressed into the North Atlantic, he could have deferred the work until a different time if the weather conditions at a given moment created a hazardous condition. This theory finds arguable support in the following testimony given by the plaintiff on cross-examination:

> "Q. This project of cutting off and replacing these pedestal supports was an ongoing thing, correct?" "A. Yes."
>
> "Q. It had been going on for a period of time, perhaps a week, ten days, maybe more?" "A. Right."
>
> "Q. You were doing that when it was convenient and you were doing other things when it was convenient and you were doing the routine things one after the other as you chose, correct?"
>
> "MR. THALER: I object to form."
> "THE COURT: Overruled."
> "MR. THALER: Okay."

"Q. As you chose?" "A. Like, working those pedestals, when it was good weather, I could cut all those gadgets off, get ready to weld these new parts over it, because they had already made three or four of them. I don't know who made them. I could put those on in good weather and when it was bad weather I could—they didn't take long to make it. You don't have to work for days. I could make four, five in one day or maybe six, maybe all eight." Tr. 28-29.

Against this record, the Court charged the jury, without exception, on the issue of contributory negligence in pertinent part as follows:

"In this case, in order to establish that the plaintiff was negligent, the defendant must prove an act of negligence other than the plaintiff's knowledge of a dangerous condition in the area of his work. That is because under the law, the plaintiff did not assume the risk of his employment. That is, he does not under the law assume the risk of a negligently created condition.

"But the plaintiff was under a duty to make reasonable use of his own senses, in order to avoid injury to himself. In that regard, you must consider the defendant's argument that Mr. Akermanis could have arranged his work schedule so as to complete this particular burning and welding project while the vessel was in calmer waters, earlier in the voyage, before passing through the straits of Gibraltar into the North Atlantic."

The jury, so instructed and in the light of this evidence, answered in the affirmative the following question on the special verdict:

"5. Has defendant proved, by a fair preponderance of the credible evidence, that there was any contributory fault of plaintiff Carl Akermanis, which proximately caused his accident?"

And, having answered that question in the affirmative, the jury assessed the percentage of contribution of the plaintiff's own fault to the accident at 4%, leaving the remaining 96% to fall upon defendant.

If the jury had concluded that plaintiff was free of contributory negligence, a question of some difficulty might have arisen as to whether that conclusion was not only erroneous, but "seriously" so. However, the jury by its verdict has voiced its conclusion that, in fact, fault of the plaintiff contributed to his accident. In the circumstances of this case, I have no difficulty at all in concluding that the minimal percentage assigned to that fault constitutes clear and serious error.

Defendant argues that a finding of 4% contributory negligence is, in the circumstances, "unsupportable." Main brief at 16. Defendant cites no case for this proposition, or to indicate what a proper allocation should be. But I am persuaded, on the basis of my own research, that the general proposition is sound, and that a significant increase in the degree of contributory negligence is required to prevent a miscarriage of justice. The subjects of "assumption of risk, contributory negligence, and division of damages" are treated in West's Federal Practice Digest under "Seamen," key number 29(4). Examination of the headnotes indicates that, in cases where judge or jury have found contributory negligence on the part of the plaintiff, the allocated percentages fall for the most part between 20% and 50%. Of course, each case turns upon its own circumstances; but this trend of decision reflects a general awareness that if a seaman's negligence contributed to his shipboard injury, it did so to a significant degree.

While I find no precedent for so minimal an allocation in a case where a seaman's negligence has contributed to his own injury, I do not hold that a 4% allocation for contributory negligence can never be appropriate. But I do conclude that, in the circumstances of this case, it cannot be. As defendant accurately states in its brief at 16, this is a case "in which plaintiff was working voluntarily on overtime and in which he admitted that he exercised discretion as to when and how he

would perform this routine task." No compulsion to do this work at this time appears. Plaintiff could have reasonably forseen that it would be safer to do burning and finishing work on an exposed deck in the Mediterranean rather than the North Atlantic. In somewhat comparable circumstances judges sitting without juries have found 50% contributory negligence factors. See, *e. g., Nygaard v. Peter Pan Seafoods, Inc.*, 508 F.Supp. 151, 154 (W.D.Wash.1981), per Senior District Judge Beeks; *Haughton v. Blackships, Inc.*, 334 F.Supp. 317 (S.D.Tex.1971), *rev'd on other grounds*, 462 F.2d 788 (5th Cir. 1972).

In the case at bar, the jury clearly indicated its view that a considerably greater share of fault should be allocated to the defendant shipowner. In reaching that conclusion, the jury presumably had in mind plaintiff's testimony that the chief engineer instructed him to work on deck on the day in question, testimony which permitted plaintiff's counsel to argue in summation that, under the adverse weather conditions prevailing, and nothwithstanding plaintiff's option to do something else that morning, "the assignment should never have been given" by the chief engineer, and that the chief officer should not have permitted plaintiff to continue in his work. Tr. 68. While I regard the jury's precise assessed percentages as impermissible, it is entitled to place the greater share of the fault upon defendant. My view on this aspect of the case is that, in the totality of circumstances, a contributory negligence allocation of only 4% is seriously erroneous; and that defendant is entitled to a new trial on liability issues, unless plaintiff agrees to a remittitur of the damages awarded, based upon a contributory negligence factor of 25%. The procedure that will be followed in the event of a new trial is discussed under Point VI *infra*.

III.

Defendant contends that the jury's awards of damages are excessive. Consistent with preferred practice, cf. *Gretchen v. United States*, 618 F.2d 177, 180-81 (2d Cir. 1980), the jury

completed a special verdict calculating separate amounts for past and future loss of earnings, and past and future pain and suffering. Defendant challenges each award.

In passing upon a motion challenging a jury's verdict as excessive, "the trial judge is not called upon to say whether the amount is higher than he personally would have awarded," *Dagnello v. Long Island Railroad,* 289 F.2d 797, 806 (2d Cir. 1961), citing with approval *Delaney v. New York Cent. R. Co.,* 68 F.Supp. 70 (S.D.N.Y.1946), and *Lopoczyk v. Chester A. Poling, Inc.,* 60 F.Supp. 839 (S.D.N.Y.), *aff'd,* 152 F.2d 457 (2d Cir. 1945). In *Delaney,* this Court said:

> "Even though I might disagree with the amount of the verdict, I have no right to substitute my mind for that of the jury. A verdict will not be set aside simply because it is excessive in the mind of the Court, but only when it is so grossly excessive as to shock the Court's sense of justice and the impropriety of allowing it to stand is manifest." 68 F.Supp. at 73.

Lopoczyk, supra, expands on the theme in these words:

> "It is familiar learning that the court should not set aside a verdict on the ground that it is excessive unless it is so high as to shock the conscience. This rule is to be applied even where there is some feeling on the part of the trial court that a smaller verdict would have been more appropriate . . . The principle is that if the court should set aside the jury's verdict in the absence of a showing of caprice, passion or prejudice, it would be usurping the jury's function . . . The power to set aside should be cautiously used because where pain and suffering and permanent injury are involved there can be no exact yardstick and the jury's determination should stand unless it is clearly unreasonable." 60 F.Supp. at 840 (citations omitted).

At the appellate court level, the standard of review is essentially the same. See, *e. g., Mileski v. Long Island Rail-*

road, 499 F.2d 1169, 1173 (2d Cir. 1974) (". . . we cannot say that this award was so grossly excessive or shocking to the conscience that it would be a 'denial of justice to let it stand,' " citing *Dagnello, supra,* and *Grunenthal v. Long Island Railroad,* 393 U.S. 156, 159, 89 S.Ct. 331, 333, 21 L.Ed.2d 309 (1968)); *Gibbs v. United States,* 599 F.2d 36, 39 (2d Cir. 1979); *Zarcone v. Perry,* 572 F.2d 52, 56-57 (2d Cir. 1978); *Fernandez v. Chios Shipping Co., Ltd.,* 542 F.2d 145, 155 (2d Cir. 1976) (". . . although the jury's verdict for the longshoreman was generous, it was not so excessive as to shock the court's conscience"); *Vaccaro v. Alcoa Steamship Co.,* 405 F.2d 1133, 1139 (2d Cir. 1968).

The jury's award of lost earnings will stand if there is evidence in the record to support it. *Grunenthal v. Long Island Railroad, supra,* 393 U.S. at 160, 89 S.Ct. at 333; *Williamson v. Compania Anonima Venezolana de Navigacion,* 446 F.2d 1339, 1342 (2d Cir. 1971). An award for pain and suffering, necessarily depending upon less precise measures of calculation, will not be disturbed unless so grossly excessive as to shock the conscience and to constitute a denial of justice. *Mileski, supra,* and other cases cited.

Judged by these standards of review, the present jury's awards are invulnerable to challenge. The amounts for past and future lost earnings find adequate support in the record. As noted under Point I, *supra,* I decline to disturb the jury's findings that, as the result of the defendant's negligence, plaintiff suffered permanent injury which terminated a career at sea he would otherwise have continued. Plaintiff became disabled in June, 1977, at age 59. He called as a witness Daniel Colon, a union official, who testified without contradiction that the mandatory retirement age for merchant marine engineers was 70, and that berths had been and remained available on American flag vessels. Because of industrial retooling, plaintiff would probably have had to upgrade his license from steam to diesel in order to secure continued employment; but he testified that it had been his intention to do so, and the jury was entitled to believe him. The jury awarded plaintiff $160,000 for past lost earnings (1977-1981), and $118,000 for

future lost earnings (post-1981), for a total of $278,000. The amounts plaintiff would have earned under the union contract were established by Colon's testimony. Taking into account the increases in wages called for by the union contract, and reasonably predictable overtime based upon plaintiff's past performance, plaintiff would have earned $225,336.62 during the period 1977 through 1983 under a steam license and $280,870.28 if he had obtained a diesel license. Thus the total amount awarded by the jury is supported by the evidence of what he would have earned, had he continued to sail through age 66. The jury evidently declined to award future lost earnings beyond that age although, as noted, plaintiff would not have been required to retire until he was 70. The awards for lost earnings, being supported by evidence in the record, will not be disturbed.[1]

The jury also awarded plaintiff $150,000 for past pain and suffering, and $100,000 for future pain and suffering, making a total of $250,000 under this general heading. The total award is undoubtedly generous. I might well have awarded a lower figure. Neither of these factors, under the controlling authorities, is of legal significance. The case concerns jury findings of permanent and debilitating back pain, which put an end to the career of a man who loved the sea. The award for pain and suffering is not of a magnitude to shock the Court's conscience, or amount to a denial of justice.

In short, I deny the motion for a new trial or remittitur based upon the asserted excessiveness of the damages awarded.[2]

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1 Defendant argues that a series of post-accident hospitalizations, unrelated to the accident, would necessarily have prevented plaintiff from earning wages in an amount equal to the jury's award. But the hospitalizations were of relatively brief duration, and, in view of the undisputed evidence concerning the amount of shoreside vacation plaintiff received each year under the union contract, would not necessarily have interrupted his earnings.

2 Defendant complains that the jury adopted the figures suggested by plaintiff's counsel in summation. As for lost earnings, counsel based his

IV.

As an alternative basis for relief, defendant contends that improprieties of plaintiff's counsel during summation inflamed the passion and prejudice of the jury, thereby depriving defendant of a fair trial.

While defendant's counsel is generally critical of his adversary, only two comments made by plaintiff's counsel during summation require discussion. The first involves what defendant regards as an unfair imputation of perjury to defendant's witnesses. The issue arises in this manner. Chief Officer Moulton of the LOS ANGELES testified by deposition that, in a conversation with Chief Engineer Carver of that vessel on April 1, 1977, the day after plaintiff joined the vessel for the voyage in question, Carver told Moulton that "whenever he asked Mr. Akermanis to perform a task requiring responsibility, Mr. Akermanis tended to become ill."[3] Defendant relied upon this testimony in urging that a wave of dizziness which plaintiff testified he suffered several days after the accident was not causally related to the accident. In order to rebut this theory, plaintiff's counsel relied upon the following testimony given by Chief Engineer Carver at his deposition:

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calculations on the record evidence, which as noted *supra* was sufficient to sustain them. On pain and suffering, counsel said:

> "We ask you to consider a sum of $150,000 for pain and suffering to the present, and we ask you to consider $100,000 for pain and suffering for the future." While the jury gave favorable consideration to those figures, counsel's remarks did not rise to the level of expressed personal opinion that the Second Circuit criticized in *Mileski, supra*, at 1172—1173, and thus did not necessitate a curative instruction. Cf. *Mileski* at 1174. Nor did defendant object to this use of specific figures, or ask for a special instruction. In these circumstances, the adoption by the jury of figures suggested by counsel in summation furnishes no basis for a new trial or remittitur.

3 Carver's out-of-court declaration, offered to prove the truth of the matter asserted, would appear to be inadmissible hearsay, Rules 801(c), 802, F.R.Evid., but plaintiff raised no objection.

"Q Did you know Mr. Akermanis before he joined the vessel?" "A I attended school with him in Baltimore, Maryland, electrical school at the union school."

"Q When was that about?" "A I have no idea now. It was some time in the past."

Page 14:

"Q Did he ever sail on any of your ships?" "A No."

In the light of that testimony, plaintiff's counsel argued to the jury that Moulton's account of what Carver told him was a fabrication, Carver having testified that plaintiff had not sailed "on any of [his] ships."

Defendant attacks this argument as unfair because, in fact, plaintiff had sailed on the LOS ANGELES with Chief Engineer Carver during the period August through December, 1976. That is established by individual overtime sheets which defendant produced, *for the first time*, in support of the present motion. Long before trial, plaintiff had requested from defendant all of his work records, documents which rested within defendant's possession and control. Defendant forwarded a number of employment and overtime records to plaintiff's counsel; however, the overtime records for the period August-December, 1976 evidencing plaintiff's presence on board the LOS ANGELES, were not included. Defendant's counsel, in his affidavit in support of the present motion, says:

> "A search of our file indicates that we were not in possession of plaintiff's records for that period, which were either misplaced or inadvertently not forwarded to us by defendant. Our firm then appears to have inadvertently forwarded the incomplete records to Mr. Thaler as part of our production of documents." Stearns affidavit at ¶ 32, p. 29.

It is apparent, therefore, that defendant failed to comply with a legitimate demand for production of highly pertinent documents. Defendant now seeks to parlay its own failure into

a ground for obtaining a new trial. One can almost admire the nerve of the effort, but it is devoid of merit. Defendant argues:

> "There are two questions presented: (1) did the attorney for plaintiff know of the fact that, indeed, plaintiff and Carver had sailed in August to December 1976 as respectively Chief Engineer and Third Assistant Day Engineer aboard S/S LOS ANGELES and; (2), if the attorney should claim that he was not aware of this fact, what would excuse his failure to inquire of plaintiff before making such a central allegation of perjury in an effort to tip the balance in his favor in argument before the jury." Stearns affidavit at ¶ 30, pp. 28-29.

Counsel's peroration appears in the last paragraph of his affidavit:

> ". . . the new trial issue of misconduct as a result of the imputation of perjury might be seen as turning upon single factor: the attorney's failure to ask plaintiff during direct examination whether or not he had sailed with Carver in 1976. A truthful answer to this question would have deprived plaintiff of any basis for the assertions of perjury in summation. A false answer would have, at least, alerted the defendant to the existence of some relevance to the question, and might have resulted in conclusive refutation, with the same effect. Instead, the attorney for plaintiff was content with what was at best, ambiguity and withheld the argument until summation, and this was deliberate." Stearns affidavit, ¶ 43, p. 40.

Plaintiff's counsel avers, in an answering affidavit, that "plaintiff had no recollection of serving with [Carver] one way or the other." Thaler affidavit at ¶ 115, p. 55. I accept that representation as plausible in the circumstances. Precisely for that reason, plaintiff's counsel explored the subject during Carver's deposition, with the answer quoted above. Plaintiff's counsel further explored the question by demanding the plaintiff's work records, with the results also described above. In

these circumstances, plaintiff's counsel can hardly be criticized for asking the jury to draw the inference that Chief Officer Moulton was embellishing his conversation with Carver. These events do not reveal an improper failure on the part of plaintiff's counsel to inquire; they reveal an improper failure on the part of defendant to respond to discovery. I accept the inadvertence of that failure, but defendant is hardly in a position to turn it to its advantage. It is permissible for counsel, in summation, to argue that the opposing party's witnesses were "less than candid and impartial" if, in the circumstances, the argument is "not without support in the record." *Juaire v. Nardin*, 395 F.2d 373, 377 (2d Cir. 1968). That is the situation in the case at bar.

The second issue requiring discussion relates to what counsel for both parties said in their summations about the presence, or absence, of spray upon the deck at the time of the alleged accident. Plaintiff called an expert witness, Captain Adams, to testify that, as the result of the wind and wave conditions and speed of the vessel, spray would have been present on the deck in the area where plaintiff was working. Plaintiff, in a supplement to the pre-trial order, had identified Adams as an expert witness it might call. At the conclusion of Adams' testimony, counsel for defendant advised the Court that he expected to call an expert witness "on the sole question of the possibility or likelihood of the existence of spray on the deck." Counsel stated further that he expected his expert to say that "the vessel was making a wake at the time, cutting through the water, and that there is no possibility whatsoever of such spray" from the waves existing at the time reaching the work area.

Plaintiff objected to the proffered expert testimony, on the grounds that defendant had failed to give notice of its intention to call such an expert, either in response to plaintiff's specific interrogatories on the point, or, as required, in the pre-trial order or a supplement thereto. The Court sustained plaintiff's objections, finding entirely unpersuasive (for reasons appearing in the trial transcript and not here repeated) the argument of defendant's counsel that he had been taken by surprise by Adams' testimony about spray on deck.

In the light of the Court's ruling that defendant was precluded from calling a "spray" expert, defendant's counsel raised the question of whether plaintiff's counsel would be permitted, in summation, to comment upon defendant's failure to call an expert witness to rebut the claim of spray on deck. The Court responded:

> "I think that if Mr. Thaler undertook to say that in summation, I would be bound to advise the jury of the dialogue that we have just had, the application made on behalf of the defendant, and my ruling in respect to it."

Against that background, defendant's counsel, in giving the first summing up to the jury, argued as follows with respect to the testimony of plaintiff's expert, Captain Adams:

> "He also indicated the spray, if any, coming aboard the ship would be coming at a point where the seas met the ship's bow. He then later said that any place alongside the starboard side some spray might be thrown up as a result of waves or the sea lapping against the ship's side and might somehow come on the deck.
>
> "He forgot to mention the fact that *when a ship goes through the water it makes a wake. The wake is the effect of the ship pushing the water out of the way, and as the water is imparted it moved away from the ship's side, not towards it.*
>
> "This might lead you to believe, and I suggest it's correct that in fact if any spray was coming aboard this ship as a result of encountering waves as high as 5 or 6 feet it would have been in the immediate vicinity of the starboard bow, a distance of some 400 feet or more, most likely 500 feet from where Mr. Akermanis was working.
>
> "And in addition, you remember the testimony of Captain Adams to the effect that ship was, in breadth, that is from side to side, some point port to starboard, some 78 feet wide.

"That is correct, according to my calculations based on Lloyd's Registry, it was perhaps 10 feet. Another witness said 7 or 8 feet inboard from the starboard rail which means that he was a distance of no less than 68 feet on the longer or leeward side away from the rudder at the time of the occurrence.

"*With all these factors considered* and the additional fact that he was standing above the deck a distance of three or four feet, he was given the picture of the sea provided by the scale photographs. It's possible [sic] for the spray to have been on the pedestal and the place where plaintiff says it was." (Tr. 6—8) (emphasis added) (The word "possible" as appearing in the transcript should obviously be "impossible.").

This argument led plaintiff's counsel, in his summation, to say the following:

"Now, with regard to the spray, you recall the testimony that the water itself with these forces will have a spray on the water, a slight spray. Then the motion of the ship through the water, the spray is going to come up over and that was the undisputed testimony, notwithstanding what you have heard in argument here. There has been no testimony which disputes or contests that fact." (Tr. 51).

The following thereupon occurred:

"MR. STEARNS: In view of the Court's ruling on this point, this is an absolutely improper argument to make."
"THE COURT: I will say to the jury at this time that as a result of the ruling on a point of the law, which you are not aware of and which need not concern you, at the time the defendant decided to put on an expert witness to give evidence on the point that spray could not have come on the deck, as a result of a ruling of law which need not concern you, I declined to let that testimony in. I think you should know that in view of what counsel has just presented to you in argument." (Tr. 51).

Following summations, and in the absence of the jury, the Court expressed concern that the remarks of plaintiff's counsel transgressed the spirit, if not the precise wording, of the Court's ruling when defendant was precluded from calling a "spray" expert. Upon further consideration, however, I accept plaintiff's argument that the challenged statement of his counsel constituted fair comment upon what defendant's counsel had argued in his summation. Having failed to abide by the discovery rules and the requirements of the pre-trial order, defendant was precluded from calling an expert witness to describe how the vessel's wake would prevent spray from the waves affecting the work area. Defendant's counsel, in summation, sought to remedy the lack by supplying the testimony himself. In those circumstances, plaintiff's counsel was entitled, in fairness, to argue to the jury that the presence of spray was established by "the undisputed testimony, notwithstanding what you have heard in argument here," and that there was "no testimony which disputes or contests that fact."

It is, of course, well settled that "[i]mproper or intemperate argument by counsel in summation may necessitate a new trial where it tends to arouse undue passion or prejudice on the part of the jury, thereby depriving the opposite party of a fair trial." *Mileski, supra*, at 1171, and cases there cited. The courts should not hesitate to grant relief where counsel indulges in "outrageous argument," *San Antonio v. Timko,* 368 F.2d 983 (2d Cir. 1966), or when counsel "repeatedly went beyond the bounds of propriety," *Koufakis v. Carvel,* 425 F.2d 892, 901 (2d Cir. 1970). The Supreme Court has mandated a new trial where the record reveals "a bitter and passionate attack on petitioner's conduct of the case, under circumstances tending to stir the resentment and arouse the prejudice of the jury," *New York Central R.R. Co. v. Johnson,* 279 U.S. 310, 318, 49 S.Ct. 300, 303, 73 L.Ed. 706 (1929). But no such improprieties were committed in the case at bar. On the contrary, the comments which defendant particularly criticizes were justified by the circumstances. Complaints of prejudicial and unfair arguments to the jury are not sufficient to obtain a new trial where the behavior of counsel is not outrageous, and the jury's

verdict is justified, as in the case at bar, by the evidence in the record. *Fortunato v. Ford Motor Co.*, 464 F.2d 962, 971 (2d Cir. 1972).

V.

The final question raised by the parties is the rate of interest to be awarded on the judgment from the date of judgment[4] until the date of satisfaction of the judgment. Plaintiff contends that New York law, which imposes an interest rate of 9% per annum,[5] governs the issue. Plaintiff derives support for his position from 28 U.S.C. § 1961, which provides:

> "Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the

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4 In the case at bar, the judgment, which was signed on July 20, 1981, states that interest was to commence on July 15, 1981, five days prior to entry of judgment. This provision does not reflect the Court's determination that prejudgment interest is appropriate in this case, a decision defendant contends is precluded in a Jones Act case. Rather, it reflects an agreement between the parties to the effect that defendant would pay interest on the judgment from July 15, the original settlement date of the judgment, in exchange for an extension of time until July 20 within which to submit its own proposed judgment. Thus, defendant's cross-motion for an order amending the date interest was to commence is denied as moot.

5 N.Y.C.P.L.R. § 5004, as amended effective June 25, 1981. Plaintiff suggests that, if the Court should hold that New York law governs the question of the rate of interest, the Court is not bound by § 5004, but instead may look to the higher interest rates set in N.Y.G.O.L. 5-501. The purpose of § 5004, however, "is to set a fixed interest rate on judgments, independent of the usury provisions of General Obligations Law § 5-501, except as otherwise provided by statute." Law Revision Comm'n Note to L.1972, c. 358, § 1. The New York courts, to whom the Court must look should it find New York law applicable, have applied § 5004 to the exclusion of GOL § 5-501. *See* Siegal, Supplementary Practice Commentaries to N.Y.C.P.L.R. § 5004 (McKinney's Supp. Pamphlet 1964-80). Accordingly, this Court is not free to award the higher rates of G.O.L. § 5-501, but is instead limited by the 9% rate set forth in CPLR § 5004.

> courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law."

The Court's original judgment provided for 6% interest. Plaintiff moves to amend to 9%.

Although the case at bar is a "civil case" and thus apparently falls within the express terms of § 1961, defendant contends that, since the cause of action arises under the Jones Act, a federal statute, the question of the rate of post-judgment interest is governed solely by federal law. Accordingly, defendant would defer to the discretion of the trial judge, discretion defendant feels was properly exercised when the Court signed a judgment providing for interest at the rate of 6% per annum.

The language of § 1961 is mandatory; it directs that interest *"shall be"* calculated at the rate allowed by state law. Its terms do not permit of the exercise of judicial discretion in its application. *Cf. Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 312, 68 S.Ct. 1039, 1043, 92 L.Ed. 1403 (1948) (Rutledge, J., dissenting) (construing predecessor statute to § 1961). Nor does § 1961 differentiate between cases arising under this Court's diversity jurisdiction and those arising under its federal question jurisdiction; the statute simply applies to all "civil cases." As the Second Circuit noted in *Kotsopoulos v. Asturia Shipping Co., S.A.*, 467 F.2d 91, 95 (2d Cir. 1972),

> "the universal application of Section 1961 to all types of claims makes for logical uniformity. Once a claim is reduced to judgment, the original claim is extinguished and merged into the judgment; and a new claim, called a judgment debt, arises. See Restatement of Judgments § 47 (1942). A single rule should govern interest on any such debt, the nature of the original claim having become irrelevant under the doctrine of merger."

Although *Kotsopoulos* was brought under the general maritime law, its principles have since been applied to Jones Act cases. *Reinertsen v. George W. Rogers Construction Corp.*, 403 F.Supp. 1263 (S.D.N.Y. 1975); *see Barrios v. Louisiana Constr. Materials Co.*, 465 F.2d 1157, 1168 (5th Cir. 1972).

Defendant cites *Briggs v. Pennsylvania R. Co.*, 164 F.2d 21 (2d Cir. 1947), *aff'd*, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948), as support for the proposition that federal rather than state law governs the rate of interest in cases arising under a federal statute. In *Briggs*, which involved a cause of action under the F.E.L.A., there were two judgments entered—one after the original trial and the other after remand by the Court of Appeals. The question faced by the Second Circuit was from *which* of the judgments interest should run, an issue resolved in favor of the latter date by applying federal law. *Briggs* is relevant to the case at bar, however, not because the Second Circuit relied on federal law to interpret the term "the date of the judgment," as that phrase was used in 28 U.S.C. § 811, the predecessor statute to § 1961, but because the Second Circuit, and the Supreme Court on appeal, in reaching that issue necessarily assumed the applicability of 28 U.S.C. § 811 to F.E.L.A., and thus Jones Act, cases. Interpretation of § 1961 is not an issue in this case; the language in § 1961 concerning the rate of interest is clear and unambiguous. The issue is the statute's applicability to a Jones Act case, and on that *Briggs* is unequivocal.

From the foregoing, it is clear that § 1961, and through it New York state law, controls the question of the appropriate rate of interest, a rate set by N.Y.C.P.L.R. § 5004 at 9% per annum. Moreover, it should be noted that, even if the question of the rate of interest were left to the Court's discretion, considerations of public policy would warrant raising the rate of interest to 9%. In today's economy, it is not unusual for one to earn interest on one's money at a double-digit rate. Accordingly, a defendant motivated only by self-interest would be economically well advised to defer as long as possible the payment of a judgment accruing interest at a rate of 6%. Such a disincentive to ending litigation instigated for the purpose of making a plaintiff whole should not be encouraged.[6]

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6 One additional point on the form of the judgment should be noted, although not directly raised on these motions. Defendant took the position in the charge conference, after both sides had rested, that it was entitled to an instruction that the claim for lost earnings should be calculated on the basis

VI.

For the reasons stated under Point II *supra*, defendant is entitled to a new trial on the question of contributory negligence, unless plaintiff agrees to an appropriate remittitur. The remaining question is the dimension of the new trial, if plaintiff does not agree to the remittitur.

Rule 59(a) provides that a new trial "may be granted on all or part of the issues . . ." Thus the rule provides for partial new trials in appropriate circumstances. "Perhaps the most

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of net wages after taxes. Alternatively, defendant contended that the Court should judicially notice the tax rates and perform the deduction itself. After the requested instruction was denied, defendant submitted a counter-judgment in an amount reduced to reflect an accountant's calculation of the tax impact. The Court declined to sign that judgment.

Defendant relied upon *Norfolk and Western Railway v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), which the Second Circuit recognized in *Doca, supra*, at 35 may cast doubt upon that court's earlier rule that in an FELA case no deduction would be made for taxes. See *McWeeney v. New York, New Haven & Hartford R. R. Co.*, 282 F.2d 34 (2d Cir.) (en banc), *cert. denied*, 364 U.S. 870, 81 S.Ct. 115, 5 L.Ed.2d 93 (1960). In *Liepelt* plaintiff's expert testified that decedent, had he lived, would have earned wages totalling $302,000. Defendant offered to prove, through an expert actuary, that income taxes would have reduced the pecuniary loss to a net figure of $138,327. Defendant also requested an instruction to the jury that the award of damages would not be subject to income taxation. The jury awarded plaintiff $775,000. The Court held that the proffered evidence should have been received, and the requested instruction given.

In the case at bar, the parties were directed to submit their requests to charge prior to trial. Defendant asked that the jury be instructed that any award to plaintiff would not constitute taxable income. That charge was given. Defendant did not ask for an instruction that the jury should *reduce* its award to reflect net, after-tax figures until the proof was closed; and, unlike the defendant in *Liepelt*, offered no expert testimony on the quantum of the tax impact. In these circumstances, defendant was not entitled to the requested charge. There was no evidence before the lay jury upon which to base a calculation, and the belated timing of the request deprived plaintiff of the opportunity to meet the issue with research on the law or with evidence of his own. Nor was the Court prepared to reduce the judgment itself on the basis of defendant's post-trial calculation. The factual issues, had they been timely raised, were for the jury, and plaintiff cannot be deprived of his right to jury trial upon them.

common example is the grant of a new trial limited to damages when liability has been properly determined, but there also may be a new trial on liability with the prior determination of damages allowed to stand." Wright and Miller, *Federal Practice and Procedure,* § 2814, pp. 93-95 (1973). The granting of a partial new trial is subject to a *caveat* that "it may not be properly resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice . . ." *Gasoline Products Co. v. Champlin Refining Co.,* 283 U.S. 494, 500-01, 51 S.Ct. 513, 515, 75 L.Ed. 1188 (1931).

Contributory negligence is a liability issue. As the Fifth Circuit observed in *Landry v. Two R. Drilling Co.,* 511 F.2d 138, 143 n.4 (5th Cir. 1975), "[a]lthough contributory negligence is often referred to in these cases as a factor 'in mitigation of damages', *e. g., Pope & Talbot v. Hawn,* 346 U.S. 406, 409, 74 S.Ct. 202, 204, 98 L.Ed. 143 (1953), it is conceptually a factor in assessing the relative *liabilities* of the parties." (emphasis in original). Thus, where the trial court fails to properly instruct the jury on contributory negligence, but the jury's calculation of damages is invulnerable to attack, the new trial will be limited to liability issues, with the verdict on damages to stand in the event defendant is again found liable. *Dazenko v. James Hunter Machine Co.,* 393 F.2d 287, 291 (7th Cir. 1968). Cf. *Landry, supra,* which presented the converse situation:

> "Because contributory negligence is a factor for determining the comparative liability between the parties, whether under the Jones Act or general maritime law, *Pope & Talbot v. Hawn,* supra, and because we see no reason to disturb the jury's finding on liability, II supra, any award in a new trial solely on the issue of damages must be reduced by 20% by the Court." 511 F.2d 143 at n.4.

In the case at bar, there is no basis to disturb the jury's award of damages. Consequently, if plaintiff does not accept a remittitur based upon a 25% contributory negligence factor, defendant will be entitled to a new trial on liability only, at

which defendant may relitigate the issues of its own negligence and that of the plaintiff. *Dazenko, supra.*

For the foregoing reasons, it is ORDERED as follows:

1. Plaintiff's motion to amend the judgment is granted. Plaintiff is directed to file and serve, within fourteen (14) days of the date of this Order, an amended judgment providing for interest at the rate of 9% per annum from July 15, 1981 until paid.

2. Defendant's motion for judgment in its favor n. o. v. is denied.

3. Defendant's motion for a new trial on damages issues is denied.

4. Defendant's motion for a new trial on liability issues is granted, and a new trial ordered, unless within twenty (20) days of the date of entry of the judgment called for by paragraph 1 of this Order, plaintiff files with the Clerk of the Court a remittitur of all damages in excess of that amount resulting from application of a 25% reduction for contributory negligence.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6131-CSH

CARL O. AKERMANIS,

Plaintiff,

—against—

SEA-LAND SERVICE, INC.,

Defendant.

ORDER

Defendant's motion for reargument of this Court's opinion and order dated October 14, 1981, presenting no matters or controlling decisions which the Court has overlooked, is hereby denied. Counsel for plaintiff need not respond to the motion and is directed to keep the Court advised of his intentions in accordance with the October 14 order.

It is So Ordered.

Dated: New York, New York
November 2, 1981

s/ CHARLES S. HAIGHT, JR.
Charles S. Haight, Jr.
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6131-CSH

CARL O. AKERMANIS,

Plaintiff,

—against—

SEA-LAND SERVICES, INC.,

Defendant.

JUDGMENT ON A REDUCED VERDICT

The trial of the above entitled case having been tried before the Honorable Charles S. Haight, Jr., District Judge before a jury on June 15, 1981, and at the conclusion of the trial on June 26, 1981 the jury having returned a verdict in favor of the plaintiff, CARL O. AKERMANIS, in the sum of $528,000.000, and against the defendant, SEA-LAND SERVICES, INC., and the jury having found the plaintiff, CARL O. AKERMANIS, four percent contributory negligent, and the Court having ordered a new trial on liability in said action unless said plaintiff filed with the Clerk of the Court a Consent within twenty days of the date of entry of the judgment as amended which provides for nine percent interest on the jury verdict and plaintiff having filed with the Clerk of the Court a remittitur of all damages in excess of that amount resulting from the application of a twenty-five percent reduction for contributory negligence, and said remittitur having been duly executed and filed with the Clerk of the Court, it is

ORDERED, ADJUDGED and DECREED, that the plaintiff, CARL O. AKERMANIS, have judgment as against the defendant, SEA-LAND SERVICES, INC., in the sum of

$232,500.00 for the loss of earnings and pain and suffering to the present, and the sum of $171,000.00 for loss of earnings and pain and suffering in the future less a two percent discount to present value, leaving a sum total of $149,933.36 for future loss of earnings and pain and suffering, and that plaintiff have judgment in the sum of $382,433.36, together with costs and interest at the rate of nine percent per annum commencing July 15, 1981 to such date on which the judgment is paid.

Dated: New York, New York
November 5, 1981

s/ CHARLES S. HAIGHT, JR.
Honorable Charles S. Haight, Jr.
United States District Judge

Judgment Entered 11/17/81
s/ Raymond F. Burghardt
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6131-CSH

CARL O. AKERMANIS,

Plaintiff,

—against—

SEA-LAND SERVICE, INC.,

Defendant.

APPEARANCES:

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Of Counsel.

MEMORANDUM OPINION AND ORDER

HAIGHT, *District Judge*:

Following trial of plaintiff's claim under the Jones Act, 46 U.S.C. § 688 (1976), for an injury suffered on board defendant's vessel S/S LOS ANGELES, the jury found that defendant's negligence proximately caused plaintiff's accident; that plaintiff's damages totalled $528,000; that plaintiff was also

negligent; and that the share of responsibility attributable to his negligence was four percent. This Court entered judgment for plaintiff in the amount of $489,514.61, representing the four percent reduction for contributory negligence and a two percent discount on future damages.

Thereafter defendant moved for judgment n.o.v. under Rule 50, F.R.Civ.P., or for a new trial under Rule 59, or a remittitur. This Court denied the motion for judgment n.o.v., but ordered a new trial on liability issues only unless plaintiff accepted a remittitur of damages, based on an increase of the contributory negligence factor from four to 25 percent. 521 F.Supp. 44 (S.D.N.Y. 1981).

Cross appeals followed. Defendant contended it was entitled to an unconditional order for a new trial. Defendant also challenged various evidentiary rulings and the Court's charge to the jury. Plaintiff sought an increased judgment based on the jury's initial, four percent determination of the share of responsibility attributable to his negligence.

The Court of Appeals, in a unanimous opinion authored by Judge Newman, after first concluding that it had appellate jurisdiction over plaintiff's cross appeal, went on to hold that, unlike a decrease of a determination of damages, the jury's apportionment of responsibility was "not subject to adjustment by the device of a remittitur." 688 F.2d 898, 903 (2d Cir. 1982). To that extent, both parties succeeded on their appeals. Defendant's other points on appeal were rejected. This Court's judgment was accordingly reversed, and the case remanded "for further consideration consistent with this opinion," *Id.* at 907.

The "further consideration" enjoined upon this Court by the Court of Appeals requires me to decide whether, "in the context of the entire trial," the jury's assessment of plaintiff's fault "at only four percent is against the weight of the evidence," *id.* at 905. That task necessitates a review of the pertinent evidence, with a proper deference to those portions of Judge Newman's opinion which analyze it. I must then choose between the three specific options which emerge from the Court of Appeals' decision: (1) entering judgment for

plaintiff on the jury's original computation; (2) ordering a new trial limited to the question of contributory negligence, both its existence and its percentage; or (3) ordering a new trial on all liability issues.

I directed counsel for the parties to file further briefs on the question of which option should be adopted. These are now at hand, and this decision resolves the issue.

I.

Before addressing the specific question presented, defendant argues at length that Judge Newman's opinion for the Court of Appeals is full of improprieties, rising to the level of an unconstitutional abrogation of appellate judicial power. It is idle to address these arguments to me. Presumably defendant urged them in its unsuccessful petition to the Court of Appeals for rehearing *en banc*; however, as far as this Court is concerned, the analysis, rationale, and decision of the Court of Appeals combine to form the present law of the case which I must and will follow. Accordingly I will evaluate the trial evidence in the manner directed by the Court of Appeals, and chose among the three options delineated in its opinion.

In order to place this exercise in proper perspective, it is useful to quote at some length from Judge Newman's opinion. At 688 F.2d 904, Judge Newman paraphrased this Court's reasoning in granting defendant's motion for a new trial as having been:

> ". . . based on a conclusion that Akermanis had the authority to schedule his own work and that he exercised poor judgment by agreeing to work on the Los Angeles' deck on June 4, 1977, when he might have deferred the task to another day." (footnote omitted).

In point of fact, my reasoning focused more upon plaintiff's possible exercise of poor judgment in not performing this work *prior* to June 4, 1977. The LOS ANGELES was on a voyage from Piraeus to Rotterdam, with a stop en route at Algeciras; my opinion stated: "Plaintiff could have reasonably foreseen that it would be safer to do burning and finishing work on an

exposed deck in the Mediterranean rather than the North Atlantic." 521 F.Supp. at 51. Thus the intimation was that plaintiff perhaps should have accomplished this work at an earlier time, while the vessel was still in the Mediterranean, before calling at Algeciras and then proceeding into the North Atlantic.

In any event, Judge Newman's opinion resumes as follows:

> "If that was the jury's conclusion, then, based on the evidence presented at trial, Judge Haight was acting within his broad discretion in ruling that a finding of only four percent contributory negligence was against the weight of the evidence and that a new trial should be granted. It is possible, however, that the jury's finding of contributory negligence was not based on a conclusion that Akermanis chose to work on the pedestal that day. The jury might have concluded that Akermanis was directed to work on the pedestal at the time of the accident, but that he was negligent in the manner in which he performed his work. During cross-examination, Akermanis admitted that his own preoccupation with burning the bracket might have contributed to the accident. During his summation, counsel for the defendant reviewed the events surrounding Akermanis' accident and suggested to the jury that the accident 'was something due to, perhaps, a momentary lapse of carefulness on his part.' If the jury was focusing on the plaintiff's manner of working at the time of the accident, it is arguable that they considered Akermanis' work performance to be negligent but that such negligence represented only a slight percentage of the cause of the accident. In his memorandum opinion, Judge Haight gave no explicit consideration to this possible explanation for the jury's contributory negligence factor of four percent.
>
> "Ordinarily, we might not be so concerned that a trial judge explicitly consider every possible justification for a jury's verdict before concluding that a verdict is against the weight of the evidence and ordering a new trial. But this case arises under the Jones Act, and jury findings

under that Act, which incorporates standards of the FELA, are particularly resistant to being overturned. See Morgan v. Consolidated Rail Corp., 509 F.Supp. 281, 285 (S.D.N.Y. 1980). Because we recognize that a trial judge, with a 'feel' of the case, Neely v. Martin K. Eby Construction Co., supra, 386 U.S. at 325, 87 S.Ct. at 1078, is normally in the best position to determine whether a verdict is against the weight of the evidence, we prefer to have Judge Haight consider whether the 'work performance' theory of contributory negligence finds enough support in the evidence, assessed in the context of the entire trial, to justify the four percent factor. If he concludes it does not, then his order for a new trial will stand. Even if he concludes that the 'work performance' theory alone *would* support a four percent factor, then Judge Haight will have the option of either entering judgment for the plaintiff on the jury's damage computation, reduced by only four percent, or ordering a new trial. This latter option remains a possibility because of an intimation in Judge Haight's opinion that he thinks the jury would have committed serious error if they had not attributed at least part of the responsibility for the accident to Akermanis for continuing to work on deck despite the inclement weather and unsafe conditions. In other words, Judge Haight may find that the 'work-performance' theory justified a four percent factor, but that Akermanis' negligence in continuing to work is so strongly supported by the evidence that a verdict assessing his share of fault at only four percent is against the weight of the evidence, whether or not the jury based its finding of contributory negligence on the 'continuing-to-work' theory. In short, the District Judge, upon remand has discretion whether or not to order a new trial." 688 F.2d 904-06 (footnotes omitted).

Against this background, I first consider whether or not, in light of the entire evidence and the Court of Appeals' analysis of the theories of contributory negligence revealed by the

evidence, the jury's assessment of a four percent factor is against the weight of the evidence. If the answer to that question is "no," judgment will again be entered on the jury's original computation. If the answer is "yes," the question of proper structuring of the retrial arises.

II.

Plaintiff is entitled to the benefit of the jury's verdict unless, in Judge Newman's words, factors militating in favor of a greater attribution of fault on his part are "so strongly supported by the evidence that a verdict assessing his share of fault at only four percent is against the weight of the evidence," 688 F.2d at 905. This reflects the settled rule that the trial judge, operating under Rule 59, should "abstain from interfering with the verdict unless it is quite clear that the jury had reached a seriously erroneous result." *Bevevino v. M.S. Saydjari*, 574 F.2d 676, 684 (2d Cir. 1978), quoting 6A Moore's Federal Practice, ¶ 59.08[5], at 59-160-161 (1973). And Judge Newman also reminds us that jury findings under the Jones Act, "which incorporates standards of the FELA, are particularly resistent to being overturned." *Ibid.*

In reviewing the evidence on remand, I have considered both theories of contributory negligence identified by the Court of Appeals. These are the "work-performance" theory, and the "continuing-to-work" theory. Under the Court of Appeals' analysis, quoted *supra*, the "work performance" theory focuses upon plaintiff's allegedly negligent acts while working on deck. The "continuing to work" theory focuses on his alleged negligence in working on deck at all under the prevailing conditions.

In its most recent submissions to this Court, defendant argues that "the 'work performance' theory, as a comparative negligence issue, was raised for the first time by the Honorable Jon Newman at oral argument before the Court of Appeals." Counsel's letter of December 17, 1982 at 11. And, defendant continues, Judge Newman's discussion of the "work performance" theory is just plain wrong: " . . . the Court of Appeals' speculation that the jury might have found plaintiff contribu-

torily negligent *only* because of "work performance" is demonstrably unsound . . . " *Id.* at 12 (emphasis in original).

Again, it is idle to argue to me that the Court of Appeals engaged in "unsound speculation." Judge Newman conducted his own review of the evidence and summations of counsel. Judge Newman focused upon Akermanis' testimony on cross examination that "I didn't watch my foot," and defense counsel's argument to the jury that the accident "was something due to, perhaps, a momentary lapse of carefulness on his part." 688 F.2d at 905 n.4. A unanimous panel concluded that if the jury "was focusing on the plaintiff's manner of working at the time of the accident, it is arguable that they considered Akermanis' work performance to be negligent but that such negligence represented only a slight percentage of the cause of the accident." 688 F.2d at 905. That which the Court of Appeals has said is "arguable"—that is, a result permissible in law—let no district judge cast aside as unsound in law. The first task set before me is to determine "whether the 'work performance' theory of contributory negligence finds enough support in the evidence, assessed in the context of the entire trial, to justify the four percent factor." *Ibid.* I would not perform that task by accepting defendant's argument that the Court of Appeals should not have given it to me.

Applying the applicable standards of review to the "work performance" theory of contributory negligence, I conclude that a four percent factor is justified. The jury clearly accepted plaintiff's basic contentions that the work site was, in fact, unsafe; that the chief engineer and first engineer assigned Akermanis to perform the work; and the chief officer, responsible for safety on deck and aware of Akermanis' assignment, took no preventive steps. Plaintiff's counsel argued, and the jury could find, that the manner in which the burning and cutting job had to be performed left plaintiff little room for maneuver.[1] When I consider these factors within the context of

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1 Plaintiff's counsel argued in summation:

"I'd like to talk about the injury and what he was doing and he was supporting, yes, he had to support the flame, he had to put his foot

defendant's previously noted argument in summation that the accident might have resulted from "a momentary lapse of carefulness on [plaintiff's] part," I cannot conclude that a four percent contributory negligence factor brings about a "seriously erroneous result."[2]

I come, therefore, to the next question posed by the Court of Appeals' analysis:

> "In other words, Judge Haight may find that the 'work-performance' theory justifies a four percent factor, but that Akermanis' negligence in continuing to work is so strongly supported by the evidence that a verdict assessing his share of fault at only four percent is against the weight of the evidence, whether or not the jury based its finding

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> on that piece of iron, this piece of iron here, and the wind was causing the instability and he had to line it up, and his foot slipped here. What about doing that job?
>
> "The chief engineer said that's the way that job is done. You want to put your foot up to get support, you do. You get your foot up to get support, you do. You get your foot on the pedestal. That's the only way it's done. The only difference is it's not done during the adverse weather conditions that existed at the time it was done and at the time the assignment should never have been given, and if you believe Chief Officer Moulton, that he saw Mr. Akermanis, he let him continue that work." 2061 A.

2 I appreciate defendant's insistence that counsel's quoted reference to plaintiff's "momentary lapse of carefulness" was uttered solely within the context of causation, and was not intended as a contributory negligent argument. That observation finds support in the fact that, summing up on contributory negligence, defendant's counsel referred only to the "continuing-to-work" theory: "If they [the ship's officers] were wrong in permitting this work, Mr. Akermanis was certainly wrong in doing it." 2030 A. But a fine-tuned awareness of the distinction between negligence and causation, acquired by lawyers during their education both in law school and practice, may not be shared by lay jurors. It is entirely plausible, as Judge Newman observed, that the jury considered the evidence and the arguments of counsel as bearing on the issue of relative degrees of fault for the accident befalling plaintiff. And as the Court of Appeals pointed out, "it is a function of the comparative negligence doctrine to permit the jury to reconcile conflicting versions of an episode." 688 F.2d at 904-05 n.3.

of contributory negligence on the 'continuing-to-work' theory." 688 F.2d at 905.

Based upon my "feel" of the case, to which the Court of Appeals itself extends a certain deference, *ibid,* I am bound to say that my original remittitur on the contributory negligence question was based upon the perception I then had that Akermanis could, and should, have performed this on-deck burning and cutting work, while the LOS ANGELES was still in the sheltered waters of the Mediterranean. At 521 F.Supp. 49-50 I quoted certain evidence on the point; this prefaced my observation, at 51, that: "Plaintiff could have reasonably foreseen that it would be safer to do burning and finishing work on an exposed deck in the Mediterranean rather than the North Atlantic."

In obedience to the Court of Appeals' mandate, I have again carefully reviewed the evidence. That review results in a significantly altered perception.

The LOS ANGELES departed the port of Piraeus at 2048 hours on May 28, 1977, a Saturday. Plaintiff's contemporaneous Individual Overtime Sheet (Pl. Ex. 14) reflects that, on that day, he spent eight hours "working on deck repairs—supper relief." On Sunday, May 29, plaintiff logged eight overtime hours which are described, under the column captioned "nature of work performed": "Renew rusted-out fitting on deck. Supper relief." Precisely the same functions are described for eight hours' overtime work on Monday, May 30. The vessel's log reflects that she arrived at the port of Algeciras, on the southern coast of Spain, at 0530 hours on June 1. Algeciras is in the area of Gibraltar; when a vessel arrives at that port, her passage through the Mediterranean has been completed, and the North Atlantic looms ahead. After discharging part of her cargo, the LOS ANGELES departed Algeciras for Rotterdam at 0758 hours on June 2.

The evidence thus reveals that, on May 29 and again on May 30, Akermanis devoted eight hours' overtime to performing the same sort of work upon which he was engaged at the time of his accident on June 4. This is explicable by the fact that

there were a series of "pedestals" on the deck, which required this burning off and replacement of fittings. It is also clear from the evidence that, in addition to working on this project, Akermanis had other duties in the engine room to perform. While plaintiff's overtime sheet contains no notation for May 31, it is apparent that on two of the three days at sea in the Mediterranean, Akermanis devoted significant periods of overtime to this ongoing on-deck project which the chief engineer had directed him to perform.

The clear, unambiguous, and contemporaneous notations in plaintiff's overtime sheets are more probative of his work performance and opportunities during the Mediterranean passage than is his trial testimony, which upon further reflection contains certain ambiguities. While I do not consider that the record supports plaintiff's most recent submission that the chief engineer did not permit work to be done upon the particular turnbuckles involved in the accident until the vessel had left Algeciras, the totality of the evidence is inconsistent with my own prior perception that Akermanis could, and should, have attended to this deck work while the vessel was still in the Mediterranean. The totality of the evidence clearly permits the inference that Akermanis attempted to do just that, but that there were too many turnbuckles to be attended to before the LOS ANGELES reached the North Atlantic. In those circumstances, the jury would have been entirely justified in rejecting defendant's argument that plaintiff should have accomplished the work upon which he was engaged on June 4 prior to the time the vessel reached Algeciras in the early morning hours of June 1.

It is, of course, still possible for defendant to argue that plaintiff should have refused to perform the work in question in the conditions that prevailed on June 4. But that is a significantly different, and from defendant's point of view less appealing, proposition. The chief engineer had made it plain that he wished this work completed before the vessel reached Rotterdam. On June 4, the LOS ANGELES was nearing Rotterdam; she arrived at that port on June 6. When on the morning of June 4 the first assistant engineer told Akermanis

that the chief engineer wanted him to resume burning and rewelding work on deck, Akermanis (who had been on deck sounding the tanks and was "pretty wet already because the sprays [sic] was coming over the side"), responded: "That's pretty rough job in weather like this." Akermanis complied, however, with his superiors' reitereated direction that the work be performed that morning.

For the reasons indicated, I eliminate from consideration the concept that Akermanis foolishly waited until the North Atlantic to perform work that he could have accomplished in the Mediterranean. An additional reason for doing so is that defendant, bearing the burden of proof on plaintiff's contributory negligence, offered no evidence concerning the hours which Akermanis had to devote to other duties. We are left, then, only with the circumstances confronting Akermanis and his superior officers on the morning of June 4; and in those narrowed and significantly different circumstances, I conclude that the jury was entitled, within the context of the "continuing-to-work" theory, to limit plaintiff's contributory negligence factor to four percent.

My own "feel" for the case is that it was upon this theory of contributory negligence that the jury held plaintiff entitled to recover less than his full damages. Whether or not that is true, upon a further review of the entire evidence, and in the light of the Court of Appeals' decision, I am not persuaded that a four percent contributory negligence factor is against the weight of the evidence, thereby constituting serious error. Stating the proposition somewhat differently, defendant has not carried its considerable burden of demonstrating that the jury findings in this Jones Act case should be overturned.

CONCLUSION

For the foregoing reasons, judgment will again be entered in an amount consistent with the findings of the jury.

Settle judgment on notice.

Dated: New York, New York
January 18, 1983

s/ CHARLES S. HAIGHT, JR.
Charles S. Haight, Jr.
U.S.D.J.

A Right, a.m.

Q Where on board ship did you have this conversation?

A Outside the chief engineer's room.

Q Who was there during this conversation?

A I went over there. I just have—I think I see a wiper or a couple of other guys waiting for their job, so the first assistant came up in the chief engineer's room, as usually he do every morning, and I asked, question them, "What are we going to do today?"

And he told them that chief engineer—

MR. STEARNS: Objection to the hearsay.

THE COURT: I think it would fall within any admissions' exception, Mr. Stearns. I'll permit it.

Q Continue.

A He told me that the chief engineer wanted me to work on that securing—that turnbuckle gear, burn it off and reweld it and new parts were to be made.

While I was sounding tanks, just a few minutes earlier, I was pretty wet already because the sprays was coming over the side, you know, on te [sic] ship, and I told the first assistant, I said, "That's pretty rough job in weather like this."

Because we didn't have no containers on

A Okay, I told him that I—the weather is a little bit too rough, it's dangerous to go outside, and we was some kind of a—

MR. STEARNS: I move to strike, and ask that he answer the question.

THE COURT: The last part of the answer will be stricken. Go ahead.

Q What did he say, if anything?

A He said, "Well, if you can't do it," he said, "I'll do it myself."

Q What did you say?

A I told him, "Okay." I never refused to do anything, and I said, "Okay, I'd do it, because I listened what the first assistant chief tells me. "I'll go."

MR. STEARNS: Objection, move to strike, not responsive.

THE COURT: Yes, the jury will disregard the last part of the answer. The witness' answer was he replied to the first engineer, "Okay, I'll do it."

Q Is the first assistant your superior?

A Yes, the closest superior.

Q Then of course there is the chief?

A Then is the chief, right.

Q What did you do to prepare for the job

I guess it was the Mediterranean.

Q That means that this project, the burning off and the replacement of these supports was given to you, you were told to do it sometime during at least the period when the vessel was in the Mediterranean; isn't that so?

A I was doing the work day by day. I maybe work one hour on that pedestal supports, those new gadgets, and then I be working someplace else, in the sewer lines or anything else.

Q Sure.

A It was nothing—for me, I didn't have no list, "Listen Carl, now I want you to make all these things next and you install on the deck."

In the first place, I didn't even know what those gadgets was for. They had one sample. I don't know who made that sample, and I followed that sample and I made just like that.

Q The point being, sir, that this project was in the nature of an ongoing thing, correct?

A Say again.

Q This project of cutting off and replacing these pedestal supports was an ongoing thing, correct?

A Yes.

for anything. I just did the job good, no special time for it.

Q Would you say that that was something that you might have done in, say 15 or 20 minutes?

A I don't mention time at all. I just used whatever it take to flush off and have a good job.

Q The question is, can you, based on your recollection of doing that work, tell us what it was, approximately, in terms now of time that it took you to cut and prepare one of these fittings from the pedestal on the deck?

A You mean the top of the pedestal?

Q Yes. Cut it through, cut off the old piece and level it out or smooth it out, whatever you said, and get it ready for the welding; how long would it take?

A I estimate it was—it was pretty clean that top, half is rusted off, just the bottom part left. I would say make ready that platform, maybe 15 minutes, that is, 15, 20 minutes.

Q On the morning of June 4, 1977, you reported out on deck to begin work; is that correct?

A You had to mention—I mean, repeat that question.

Q On the morning of June 4, 1977, did you report

still wiper.

When I took the job, I'm still third assistant, a repairman, so I respect my engineers over me as my leaders. I don't pick up no job. They pick up the job and I do it.

Q Just as you respect them—

A I don't expect—

Q —they respect you and respect your experience and your license and your years at sea?

A After they give me the job, not before. I no going to tell chief engineer or first assistant what I have to do.

I have been with chief on that, they jump on me. They say, "Who is the chief here, you or me?"

I sail with a man under me who had older license and they was telling me what to do and give ideas. If he had a good idea, it's okay. But if not, I say, "I'm the chief there, not that man next to me—tell what to do," and I respect that.

Q Part of the mutual respect and, in fact, the respect that you were shown by the first assistant engineer and chief engineer on this vessel, in fact, no one needed to tell you precisely when or precisely how to do anything as simple as this job of replacing the pedestal supports, correct?

A Yes, after they give me the job, I do it.

Q Sure. If you want to go out and burn now, go ahead. If you want to go down to the machine shop and make up a piece, go ahead.

* * * *

"Miller

"Q Now, Doctor, if you had seen Mr. Akermanis, for example, for a pre-employment physical prior to getting aboard a vessel, a theoretical vessel, in June 1977, and you had taken x-rays on June 4 in the morning 1977, prior to any alleged injury, and had observed the degree of spondylosis that you believe existed at that time; if Mr. Akermanis was required as part of his job to go out and work on deck as a working engineer burning and welding, sometimes at some heights over the deck, would you have believed that he was disabled from doing that sort of work?

"A Well, again, I think that he probably was not disabled. In other words, he probably could do these tasks. However, I do not think they would be advisable, and therefore I think he would be disqualified from them. But that does not mean he could not do them.

"Q But when you say, 'disqualified,' you are—

"A I recommend that he not engage in these activities.

"Q Now, with respect to the situation later on in, I think, particularly September, and at least

not part of the license requirement, which is further reason, if any were needed, why it was perfectly clear that this work was not done under compulsion but was simply voluntary overtime, work he could refuse to do, work which the normal respect of one engineer for another permitted him to do obviously within some limits at his discretion.

Did he have to do the burning that morning? Could he have waited until the afternoon? Could he have waited until the next day? The answer clearly is yes.

And why did he not wait? Because in fact the conditions on deck, the weather conditions on that day, the barometric pressure, as I remember it, being well over 30, with the winds Beaufort force 5 increasing from 3 to 4, anything from 21, 22 miles an hour decreasing to probably something in the range of 10, were not unreasonable, unsafe.

In an effort to show that the ship would have known that Mr. Akermanis was working, there was testimony that the people on the bridge would have been able to see him, that is, the people on the bridge at the afterhouse looking forward some 51 feet would have seen him out there.

Mr. Akermanis has been undergoing the treatment regarding cervical problems. I'm not going to go over that, and he will continue to have them for the rest of his life, and his life expectancy, which his Honor will instruct you on is 14.14 years and—

THE COURT: Not precisely what I'm going to tell the jury. I will give the jury the appropriate instruction tomorrow.

MR. THALER: Right.

And based upon his Honor's instructions you will have to make a determination how long Mr. Akermanis will live, and Dr. Golub, you'll recall, testified as his vascular problems and gave his opinion in reading the medical record, giving him an examination, that these vascular problems and the heart problems were not disabling, not permanently disabling in that the man was definitely able to function.

I remember he said "Look at the man" and public health again made the same determination. We ask you to consider a sum of $150,000 for pain and suffering to the present, and we ask you to consider $100,000 for pain and suffering for the future. In total we ask you to consider as far as steam is concerned, steam vessels, the sum of $505,336 and for a diesel license $528,822.

AFTERNOON SESSION

(1:45 p.m.)

THE COURT: I have a note from the jury which was received at 1:30. I will mark it Court Exhibit 3. It reads as follows:

> "We have resolved our differences on the matters we have brought to you. No further evidence is required.
>
> "Are we required to install figures in Questions 3 and 4?"

It's a little surprising to me that the jury is puzzled on that point in view of the fact that Question 3 reads, "What sum do you find as damages," etc., and Question No. 4 reads, "What is the total amount," but obviously what I must do is answer them appropriately saying, "Yes," they are required to install figures in Questions 3 and 4, and I can do that in the form of a note to be sent back to the jury, and perhaps I prefer to do it that way, so let's work up the wording and I'll be glad for counsel's comments.

Why don't we all do a little drafting? I'll do some drafting, and then I'll tell you what I have drafted if you tell me what you have drafted.

Standard Form 504

U.S. Government Printing Office: 1977—241-647/2819

CLINICAL RECORD	HISTORY—Part I

NATURE AND DURATION OF COMPLAINTS (*Include circumstance of admission*)

CC- Pain in legs

HISTORY OF PRESENT ILLNESSES

63y/o male diabetic s/p Carotid endarterectomy in 1977.
No Symptoms of Amaurosis fugax or TIA's ~~Hemiparesthesia~~.

Pt c/o sticking pains in both legs also numbness and tired feeling in Legs (L>R) Symptoms occur after walking less than 100 yards. Around 6 months ago pt could walk 23-4 blocks. Claudication restricted approximately ago. ~~Pain~~
claudication occurs from hip to toe-
after walking - 1st calf tightness followed by pains.
No rest pains. Pt does not awaken at night with leg pains
Impotence - 3 years ago associates it with onset of diabetes.

G-10

(Continue on reverse side)

G. Gates, MD

PATIENT'S IDENTIFICATION (*For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility*)

REGISTER NO.

WARD NO. 2E

HISTORY—Part I
Standard Form 504
General Services Administration and
Interagency Committee on Medical Records
FPMR 101-11.906-8
October 1975 504-107

24 55 42 01/22/31
ARKANSAS, CALVIN L
AS 04/02/13 M

DOCTOR'S PROGRESS NOTES
(Sign all notes)

DATE	
OCT 19 1977	B.P. 120/60 Pt states his ears cleared up. Tylenol keeps arthritis pain under control although he complains of weakness — legs ½-1 h after medication. Will add hydrochlorothiazide ± KCl other problems. ℞ Refill ℞ See 3 mo Caldwell M.D.
NOV 8 1977	Ltr
NOV 10 1977	Patient came to Clinic without appointment because. Dental
JAN 16 1978	(S) Pt states he had some episode of passing out. Was seen at Memorial Hosp in Orlando & had surgery on left carotid artery. Will get records. (O) B.P. 170/70 Sgt 9 (142-156) wt 159 (A) See problem sheet (P) Get records from O-M Hosp. Refill ℞ — Test tape — Get FBS ½ hr PP before next visit. Caldwell M.D.
JAN 23 1978	Ltr

☆U.S. GPO:1977-0-241-530/3104

Okemmanie, Carl
3710

DOCTOR'S PROGRESS NOTES
Standard Form 509
(Reverse)

USPHS Outpatient Clinic, Tampa, Florida

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 6131 (CH5)

CARL O. AKERMANIS,

Plaintiff,

—against—

SEA-LAND SERVICES, INC.,

Defendant.

CONSENT TO REDUCE JURY VERDICT

Plaintiff, in the above entitled action, hereby consents to a remittitur of all damages on the jury verdict of $528,000.00 against SEA-LAND SERVICES, INC. that is to be reduced by twenty-five percent for contributory negligence.

In consenting to the reduction of the verdict as above stated, plaintiff does not waive any rights which he may have to appeal nor does he waive any rights which plaintiff may have to cross-appeal in the event of an appeal by the defendant.

s/ STEVEN THALER
Steven Thaler
Of Counsel to
Markowitz and Glanstein
Attorneys for Plaintiff

Sworn to before me this
9th day of November, 1981

s/ HELEN E. GOLDSTEIN
Helen E. Goldstein
NOTARY PUBLIC, State of New York
No. 31-1492460
Qualified in New York County
Commission Expires March ____ 1983